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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CAPITAL TELECOMMUNICATIONS, INC.
Complainant,

v. File No. E-91-18
GTE NORTH
INCORPORATED,
Defendant.

ORDER

Adopted: July 1, 1991; Released: July 16, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 23, 1990, Capital Telecommunications, Inc. ("CTI") filed a formal complaint against GTE North Incorporated ("GTE North") alleging that GTE North charged discriminatory rates to CTI in violation of Section 202 of the Communications Act. GTE North denied the allegations and moved to dismiss the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On June 28, 1991, counsel for CTI and GTE North filed a joint motion seeking dismissal of the complaint with prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CALL AMERICA, INC.,
Complainant,

v. File No. E-90-254

PACIFIC BELL,
Defendant.

ORDER

Adopted: June 28, 1991; Released: July 16, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Call America, Inc. ("Call America") filed the above-captioned formal complaint against Pacific Bell (the "Defendant") seeking reimbursement and other appropriate relief for excessive interstate access charges allegedly levied by the Defendant against Call America during the period January 1, 1987 through December 31, 1988. The Defendant denied the allegations and moved to dismiss the complaint.

2. On February 7, 1991, the Enforcement Division released an Order holding the complaint in abeyance pending final Commission action on a related proceeding remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] On June 14, 1991, however, Call America filed a Motion to Lift Abeyance Order and for Permission to Withdraw Complaint, stating that the parties have entered into a formal resolution of the complaint.

3. On the basis of the statements contained in Call America's Motion, we conclude that there are no longer issues in controversy and that this proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Call America's Motion to Lift Abeyance Order and For Permission to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *See* Call America, Inc. v. Pacific Bell, DA 91-105 (released February 7, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 82-243

In the Matter of

Amendment of Parts 1, 21, 22,
74 and 94 of the Commission's
Rules to Establish Service and
Technical Rules for Government
and Non-government Fixed Service
Usage of the Frequency Bands
932-935 MHz and 941-944 MHz

THIRD REPORT AND ORDER/
MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1991; Released: July 16, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission adopts rules that limit the number of applications a party can file in the Government/Non-government fixed service for point-to-multipoint channels in a particular market. Our intent is to preclude parties from filing multiple applications for the purpose of increasing their chances in any lottery held to select licensees. This will ensure fairness in the lottery process and lessen the administrative burden for both applicants and the Commission. This action also dismisses a petition for reconsideration of the *Memorandum Opinion and Order* in this proceeding filed by Mr. Dennis C. Brown and Mr. Robert H. Schwaninger, Jr. (Brown and Schwaninger).[1] Specifically, the Commission declines to change its frequency assignment method for point-to-multipoint channels.

BACKGROUND

2. In the November 1984, *First Report and Order* in this proceeding, the Commission allocated the 932-935/941-944 MHz bands for Government and Non-government fixed service users on a co-primary basis. Subsequently, in March 1987, the Commission issued a *Third Notice of Proposed Rule Making* (*Third Notice*), that proposed procedures and rules to be followed in applying for and using the 932-935/941-944 MHz bands. In particular, the *Third Notice* proposed that the entire allocation be used for point-to-point applications, but requested comment on the desirability of allowing point-to-multipoint entities to access a portion of the allocation. Parties commenting on the *Third Notice* unanimously favored the designation of at least one megahertz of spectrum for point-to-multipoint use. The Commission found these comments persuasive, and, therefore, in February 1989, adopted a *Second Report and Order* wherein, among other things, it designated the 932-932.5/941-941.5 MHz bands for point-to-multipoint use.

3. In April 1989, five parties filed Petitions for Clarification and/or Reconsideration of the *Second Report and Order*. For the most part, all five filings concerned the point-to-multipoint portion of the allocation; *i.e.* the 932-932.5/941-941.5 MHz bands. The Commission issued a *Memorandum Opinion and Order* in March 1990 that clarified the frequency coordination procedures to be followed in coordinating applications. It also indicated when applications will be considered mutually exclusive and the procedures for selecting among competing applicants. With respect to the point-to-multipoint applications, the Commission decided to conduct a nationwide lottery wherein all applications received would be ranked and then processed in the order of their ranking. Finally, the *Memorandum Opinion and Order* addressed several minor issues relating to the point-to-multipoint portion of the allocation.

4. In accordance with the *Memorandum Opinion and Order*, the Commission's Office of Engineering and Technology (OET) released a *Public Notice* on June 4, 1990, that solicited applications in the new fixed service. The *Public Notice* established an initial one-week filing window from July 9 until July 13, during which applications would be accepted and also reiterated that lotteries would be used to resolve instances of mutually exclusive applications.

5. Prior to the opening of this filing window, however, the Utilities Telecommunications Council (UTC) filed concurrent petitions with the Commission requesting that the window be stayed and that the application filing procedures be clarified or reconsidered. In support of this request, UTC cited the failure of the *Public Notice* to prohibit applicants from filing multiple applications for the same communications requirement merely as a means of improving their odds of receiving a channel in a lottery. UTC contended that as a result of this omission and the Commission policy in other services of limiting the filing of multiple applications in lotteries, applicants would be uncertain as to whether they could file multiple applications during the filing window. In its "Reconsideration Petition", UTC requested that the Commission remove this uncertainty by clarifying whether multiple applications for the same site or service area would be accepted from the same or substantially the same applicant, absent a special showing of need in accordance with current Commission licensing policies. While UTC preferred that the Commission limit the number of applications that any applicant may file within a given geographic area, it was most concerned that all potential applicants receive clear guidance on the filing of multiple applications before the Commission commenced accepting the point-to-multipoint applications. On July 2, 1990, OET released an *Order* granting the stay of its filing window, as requested by UTC.

[1] *See* "Petition for Reconsideration" filed by Dennis C. Brown and Robert H. Schwaninger, Jr. on April 16, 1990. The petition proposed a computerized frequency assignment program for point-to-multipoint frequencies.

6. On October 5, 1990, the Commission adopted a *Fourth Notice of Proposed Rule Making (Fourth Notice)* that proposed rules to limit the number of applications a party can file in the Government/Non-government fixed service for point-to-multipoint channels in a market to the actual needs of the applicant.[2] Specifically, the Commission proposed that common carrier (Part 22) applicants be prohibited from identifying the same base station in multiple applications and that private radio (Part 94) applicants be limited to one channel or channel pair within a 25-mile radius of each master station. The Commission did, however, propose that an applicant having a legitimate need for more than a single point-to-multipoint channel or channel pair in a particular market should not be precluded from applying for multiple facilities. Further, the Commission stated that the differing nature of point-to-multipoint uses under Parts 22 and 94 of the Commission's Rules requires separate rules for each service.

7. Common carrier Part 22 point-to-multipoint, or multiple address systems (MAS), use of fixed facilities consists of controlling one-way signaling operations. Typically, a Part 22 multiple address control station communicates with four or more base station transmitters that in turn communicate with individual paging receivers; these base stations must be listed in the application. The Commission anticipated that most Part 22 applicants for the 932-932.5/941-941.5 MHz bands will require only one channel pair per service area. However, it recognized that some applicants may have a need to control base stations in more than one paging system in a particular service area. Thus, the Commission was concerned that restricting Part 22 applicants to only one application per service area could run counter to the public interest because it might prevent a paging control requirement from being fulfilled. Therefore, it stated that a better approach would be to prohibit these applicants from identifying the same base station in multiple applications. Specifically, it proposed to change Section 22.501(g)(1) of the rules to limit applications accordingly. It also proposed to clarify that the control station may control a base station that is co-located with it; *i.e.* one of the four base stations does not have to be "remote" from the control station. Given that all control stations will have to control at least four simultaneously operated base stations on the same frequency assignment to qualify for licensing under Section 22.501(g)(1), the Commission believed that this rule, as modified, would adequately prevent Part 22 applicants from filing multiple applications merely to increase their chances of winning in the lottery.

8. Part 94 users typically construct stations that communicate with more locations than the typical Part 22 station. The Commission stated that, as these users are not required to specify remote station coordinates on their applications, a different criterion must be relied on to determine whether an entity has filed duplicate applications. The Commission concluded that a mileage separation would satisfy its concerns about duplicate applications from Part 94 users without unduly complicating the licensing process. The technical parameters associated with multiple address system design are expected to provide licensees with a 25-mile radius service area centered on the master station. Therefore, the Commission proposed to prohibit any party from having an ownership interest, direct or indirect, in two or more applications that specify sites within 25 miles of each other, unless all applications having such common ownership within the 25 mile area acknowledge the party's common interest in the applications and describe in detail how each system will be serving different needs; *e.g.*, separable communications requirements or services. The Commission proposed that any application subject to this prohibition that fails to make the appropriate acknowledgement would be dismissed along with all other applications having a commonality of interest within 25 miles. Further, the Commission indicated that if a showing was submitted and subsequently found inadequate, the applicant would be permitted to choose which duplicative application(s) would be dismissed.

9. Nine parties filed comments and three parties filed reply comments in response to the *Fourth Notice*. All respondents support the objectives of the *Fourth Notice* and agree that the Commission's proposed rules are necessary to prevent the lottery from being inequitable. The commenters raise several other issues regarding the implementation of the proposed rules which are addressed below.

DISCUSSION

10. Based on our review of the record in this proceeding, we continue to believe that the practice of filing multiple applications solely to improve one's chances in the lottery should be prohibited. We find that, with some modifications, the rules proposed in the *Fourth Notice* prohibiting such actions are warranted. We note it is likely that the communications requirements of point-to-multipoint users will exceed the number of available channels in many areas, particularly, in certain major urban areas. Allowing multiple applications to be filed for the same point-to-multipoint requirement would add to the number of applications that could not be granted, would place a large administrative burden on both applicants and the Commission, and would result in inefficiencies and delayed service to the public. More importantly, permitting multiple applications for these channels would also unfairly provide an advantage to fee-exempt entities and applicants with substantial financial resources. Therefore, as originally proposed, we are prohibiting the filing of multiple applications for the purpose of increasing one's chances in a lottery.

11. The comments in this proceeding also raise a number of other issues regarding the licensing procedures for multiple address stations. A number of commenters raise concerns over the differences between processing Part 22 and Part 94 applications. In the *Fourth Notice*, the Commission proposed to prohibit Part 94 applicants from having a common ownership in applications that specify sites within 25 miles of each other. It also proposed that all Part 22 applications be required to specify at least four base stations and that applicants be prohibited from identifying the same base station in multiple applications. *See Fourth Notice* at 5 FCC Rcd 5984. UTC believes that the Part 94 requirement is more stringent than that proposed for Part 22 applicants and states that it would be more fair if we applied the Part 94 standard to all applicants

[2] *See Fourth Notice of Proposed Rule Making*, GEN Docket No. 82-243, 5 FCC Rcd 5983 (1990).

seeking to operate stations in this spectrum. Further, PacTel Paging (PacTel) argues that private carrier paging operators, who operate in a manner consistent with Part 22 licensees but are only eligible under Part 94, should only be required to meet the Part 22 test for justifying additional control frequencies.

12. We disagree that the new rules unfairly favor one group of applicants over another. As stated above, the technical and operational characteristics of Part 22 and Part 94 point-to-multipoint services are different. The technical parameters associated with Part 94 operations are designed to provide licensees with service areas of approximately 25 miles, within which they can serve many remote sites. Part 22 operations, on the other hand, are generally designed to serve a limited number of designated base stations. Accordingly, our rules and the new license application processing criteria reflect these differences. We believe that these rules will allow both Part 22 and Part 94 applicants to meet their legitimate communications needs in a fair and equitable manner and at the same time will ensure that the Commission can readily identify those applications that are filed merely to increase an applicant's chances in the lottery.

13. We believe, however, that the rules proposed for Part 94 applicants require some modification so that our intention to prohibit multiple applications will not be frustrated. We are concerned that our proposal to allow Part 94 applicants to file multiple applications for the same area if accompanied by a justification of need likely would result in some entities using this flexibility merely to increase their chances in the lottery. For example, if we were to conduct the lottery prior to evaluating justifications for multiple applications, those parties filing multiple applications would have a greater chance of being initially selected than parties filing a single application. Moreover, the lottery would be altered in a manner unfair to other applicants even if we were to adopt a policy requiring those filing multiple applications to designate which applications should be dismissed, as recommended by UTC in its comments. Therefore, to eliminate multiple applications that are not adequately justified, it would be necessary for the Commission's staff to review and reject all such applications prior to the lottery. We are concerned that this would greatly delay licensing of these stations and would be a substantial burden to our staff. It is not in the public interest to complicate and delay this lottery process in order to provide a limited number of eligible users increased flexibilities. Therefore, we will not accept any multiple applications from any Part 94 applicants for stations within 25 miles of each other. Applicants will be allowed to file for additional stations during subsequent phases of licensing consistent with existing policies governing the assignment of frequencies.[3] We believe that the vast majority of Part 94 applicants will be able to satisfy their legitimate communications needs with one application and, therefore, that this change from the *Fourth Notice* will not be burdensome to Part 94 applicants. Further, consistent with the *Memorandum Opinion and Order*, applicants will be able to request bandwidths in excess of 12.5 kHz during the initial filing window as discussed below. Although bandwidth justifications are similar in scope to the justifications for multiple stations, they do not have the potential to skew the lottery process because they are filed on a single application and will count as one entry in the lottery.

14. A number of commenters also request clarification on what information would be necessary to justify an additional channel under Part 94. Specifically, Motorola seeks to confirm that an applicant's high data throughput requirements would serve as sufficient justification for additional channels.

15. Required justification for an additional channel or station was discussed in the *Report and Order* in PR Docket 87-5. In that proceeding, the Commission concluded that there is no single appropriate standard for justifying requests for new facilities or channels and stated that such requests will be processed on a case-by-case review to determine whether the additional channel(s) or station(s) requested are necessary to meet a legitimate service need.[4] We again conclude that there is no objective standard that could easily be reviewed to justify additional channels within a 25-mile radius. Therefore, Part 94 applicants should be prepared to justify requests for additional channels within 25 miles by the technical characteristics of their proposed operations.[5] Relevant information to justify additional channels would include: the required data rate, the minimum polling interval for remotes, the anticipated number of remotes, the polling cycle for the master station, a description of the types of data to be transmitted, a breakdown of overhead time and actual transmission time, and any other information (including terrain) that justifies the request. Although any one of these factors may be sufficient to justify the request by itself, our analysis typically will consider all characteristics of the proposed station. This also will apply to private carrier paging operators.

16. Several commenters request that we clarify how an application for a license under either Part 22 or Part 94 will be affected by applications/operations in other bands.[6] Specifically, they ask whether applications for multiple address channels in the 932/941 MHz band will be considered separately from applications for the 928/952 MHz multiple address channels, and whether an entity holding an existing 928/952 MHz license will be required to provide a full justification when applying for a 932/941 MHz station at the same transmitter site or in the same area.

17. In the *Fourth Notice*, we proposed to modify our application review procedures only to limit the number of applications an entity may file. Therefore, all other procedures applicable to Parts 22 and 94 entities will apply. Consistent with current policy, applications in other bands will be taken into consideration when an application for the 932/941 MHz bands is processed. This does not mean that we will not consider and grant, if appropriate, an application that is filed to upgrade an

[3] *See* 47 CFR Section 94.15.

[4] *See Report and Order*, PR Docket No. 87-5, 3 FCC Rcd 1566 (1988). Part 94 applicants are limited, however, to a potential maximum of 50 kHz for multiple address operations. *See* 47 CFR Section 94.65(a)(1).

[5] As stated in paragraph 13, *supra*, we will not entertain justifications for additional stations during the initial filing window.

[6] Currently, common carrier and private users may apply for multiple address channels in the 928-929 MHz band, the 952-953 MHz band, and some frequencies at 956 MHz and 959 MHz.

existing operation. Again, it is important that the appropriate justification for such an application is included. We intend for this band to satisfy unmet demand for point-to-multipoint communications. This will be our overriding concern when reviewing justifications for spectrum.

18. Commenters ask whether an applicant can apply under both Part 22 and Part 94 for use of multiple address frequencies in the same area for different communications needs. We will consider only those applications for the same type of service, *i.e.*, common carrier or private, when evaluating whether an application is duplicative. Entities having requirements for both common carrier and private systems will be permitted to apply for channels under both Parts 22 and 94.

19. UTC requests that applicants be permitted to apply for a regional system license. It proposes that a regional system that would use the same frequency or frequency pair in several adjacent areas be granted or denied as a unit. Under this proposal, all the stations that would comprise the regional system would be requested on a single application. Consideration of issues relating to operation of regional multiple address systems on the 932-932.5 MHz and 941-941.5 MHz frequencies was not discussed in the *Fourth Notice*. Accordingly, we find that UTC's request regarding regional systems is beyond the scope of issues addressed in the *Fourth Notice* and we will not act herein on this request.

20. Several commenters also ask that we modify some of our operational rules. Specifically, the Association for Private Carrier Paging (APCP) requests that the 941-941.5 MHz frequencies be made available for relay purposes by Part 94 licensees.[7] Further, UTC requests that Part 94 systems be permitted to co-locate one of the four required base stations with the control station as is allowed in Part 22. The *Fourth Notice* was limited in scope to the issue of limiting the number of applications a party can file in the Government/Non-government fixed service for point-to-multipoint channels in a particular market. Therefore, the requests to modify the operational rules are outside the scope of this proceeding and will not be addressed.

Brown and Schwaninger's Reconsideration Petition

21. On April 16, 1990, Mr. Dennis C. Brown and Mr. Robert H. Schwaninger, Jr. (Brown and Schwaninger) filed a "Petition for Partial Reconsideration" to the *Memorandum Opinion and Order*. Subsequently, Brown and Schwaninger filed a "Supplement to Petition for Reconsideration." [8] In these filings, Brown and Schwaninger suggest that the Commission should not conduct a nationwide lottery to award point-to-multipoint licenses in the 932-932.5 MHz and 941-941.5 MHz bands and propose, instead, that it use a computerized frequency assignment method they have developed. The computer program used with this method would begin at a randomly selected corner of the contiguous United States and generate assignments to satisfy applications for stations in each geographical area. This program also would identify cases where applications are mutually exclusive. Brown and Schwaninger further propose that applicants not be permitted to specify a desired frequency and that mutual exclusivity be defined as multiple applications for the same site selected for frequency assignment by the computer program.

22. We have carefully evaluated Brown and Schwaninger's computer program to determine whether it could assist us in assigning the 932-932.5 and 941-941.5 MHz bands more efficiently and equitably.[9] It does not appear that their program would be more spectrally efficient than our proposed method of making assignments. Further, we believe that Brown and Schwaninger's proposal is such a major change from our current assignment process and from the method proposed in the *Fourth Notice*, that a full proceeding, including an adequate notice and comment period, would be required before we could adopt their proposal. We believe that this would unnecessarily delay implementation of service on the 932/941 MHz point-to-multipoint frequencies. Therefore, we will assign point-to-multipoint channels as set forth in the *Memorandum Opinion and Order* and are denying Brown and Schwaninger's petition for partial reconsideration.

FINAL REGULATORY ANALYSIS

23. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action: This action allows small entities not exempt from filing fees the opportunity to apply for channels in the 932-932.5 MHz/941-941.5 MHz bands on a more equal footing with those entities possessing greater financial resources and with fee-exempt entities. We do not expect our rules to have any adverse impact on small entities because, as tailored, they will enable applicants to request those facilities for which they have actual need.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected: We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives adequate service in a prompt manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Secretary shall send a copy of this *Third Report and Order/Memorandum Opinion and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

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[7] Relay links are point-to-point operations. In paging systems they are used to link a master station to a central office. The master station would then in turn feed the remote stations.

[8] Only the American Petroleum Institute (API) filed a comment to the Brown and Schwaninger petition.

[9] We note API's contention regarding Brown and Schwaninger's lack of right to reconsideration. We make no finding on this issue; however, in the interest of establishing the most equitable and efficient means of assigning channels, we have considered Brown and Schwaninger's substantive arguments.

ORDERING CLAUSES

24. Authority for this Rule Making is contained in Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g) and 303(r).

25. Accordingly, IT IS ORDERED THAT Parts 22 and 94 of the Commission's Rules, 47 C.F.R. Parts 22 and 94, ARE AMENDED as specified in the Rule Changes, below, effective **August 30, 1991.** IT IS FURTHER ORDERED THAT the petition for reconsideration filed by Mr. Dennis C. Brown and Mr. Robert H. Schwaninger, Jr. IS DENIED.

26. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

27. For additional information contact Tom Mooring, Office of Engineering and Technology, at (202) 653-8114.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

RULE CHANGES

I. Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22--PUBLIC MOBILE SERVICES

1. The authority citation in Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.501 is amended by revising paragraph (g)(1) of the introductory text to read as follows:

Section 22.501 Frequencies.

* * * *

(g)(1) The frequencies listed in this paragraph are available for control stations utilized within a multiple address system that requires the use of at least four simultaneously operated base stations operated on the same frequency assignment. These frequencies will be assigned only when there are four or more base station sites, at least three of which are remote from the control station, on the same frequency listed on the application for license. For purpose of this four base station limitation, base stations proposed to be controlled in the 932-932.5/941-941.5 MHz bands in any multiple address control application filed pursuant to this subsection cannot be listed in, or counted towards, the four base requirement of any other pending application for the 932-932.5/941-941.5 MHz bands. The frequencies may be used in paired or unpaired configurations. When paired, the higher frequency will be used by the control/relay station, and the lower frequency will be used by the control station.

* * * * *

II. Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94--PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation for Part 94 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

* * * * *

2. Section 94.15 is amended by revising paragraph (g) to read as follows:

Section 94.15 Policy governing the assignment of frequencies.

* * * * *

(g) Except as provided in paragraph (h) of this section, applicants requiring multiple transmit frequencies employed on separate paths from a single station location will not normally be authorized more than four of the transmit frequencies available in the band. Further, master and remote stations using frequencies listed in Section 94.65(a)(1) of this part will not normally be authorized more than four (12.5 kHz) frequencies or frequency pairs. During the initial filing window for the 932-932.5/941-941.5 MHz bands: (1) an applicant may not apply for a frequency or frequency pair within a 25 mile radius of any location for which it has concurrently applied; (2) further, no party may have an ownership interest, direct or indirect, in two or more pending applications proposing sites within 25 miles of each other.

* * * * *

3. In Section 94.73, the table in paragraph (a) is amended by removing footnote one, redesignating footnotes 2 through 8 as 1 through 7, and revising the first sentence in redesignated footnote two to read as follows:

Section 94.73 Power limitations.

(a) * * *

[3] For multiple address operations, see Section 94.65(a)(1)(v). * * *

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

FOIA Control No. 91-42

In the Matter of

Downtown Copy Center
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1991; Released: July 16, 1991

By the Commission: Commissioner Barrett did not participate.

1. The Commission has before it an Application for Review filed on behalf of Downtown Copy Center (DCC), appealing a March 11, 1991 Freedom of Information Act decision by the Chief, Operations Support Division, Office of Managing Director (OMD). DCC seeks review of the OMD's withholding of certain information concerning Request for Proposal (RFP) No. 90-03, issued by the Commission on February 1, 1990.

BACKGROUND

2. The RFP sought offers for the award of a contract to install and maintain photocopy and microfilm reader and printer equipment, and provide for the search, retrieval, and duplication of Commission documents. On July 6, 1990, the Commission awarded the contract to DCC. International Transcription Services, Inc. (ITS), an unsuccessful bidder in RFP 90-03, protested the contract award before the General Accounting Office (GAO), but GAO denied the protest. DCC began performance of the contract and, pursuant to federal acquisition regulations,[1] the Commission published a list of the prices that DCC would charge for its services.

3. ITS also challenged the contract award before the United States District Court for the District of Columbia. On January 23, 1991, the District Court ruled that the contract award to DCC was *void ab initio* and remanded the procurement activity to the agency for resolicitation.[2] Subsequently, the Commission decided to limit the resolicitation to a request for best and final offers from all of the offerors that had been determined to be within the competitive range in the initial procurement activity. The Commission also decided that it would retain DCC as the interim service provider until a new contract was awarded.

4. DCC sought access under the FOIA to the prices for each of the first 17 line items (unit prices) that were offered by all of the other offerors in the best and final offers for RFP 90-03. The OMD denied access to this information under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).[3] The other offerors oppose the release of the prices requested by DCC.

DISCUSSION

5. DCC argues that, because its unit prices have been disclosed to the public, all of the other offerors now have a competitive advantage over DCC in the resolicitation process. DCC asks the Commission to release the offerors' prices and thereby place all of the offerors, including DCC, on an equal competitive posture. In support of its application for review, DCC cites two GAO opinions concerning reprocurement activities by agencies in which GAO did not object to the agency's determination to release, prior to award of the new contract, the prices submitted by unsuccessful offerors in response to the initial solicitation. *See Ultra Technology Corporation*, B-230309, Apr. 20, 1988, 88-1 CPD ¶ 391; *Orkand Corporation*; *Falcon Research and Development Company*, B-203662.2, B-209662.3, Apr. 4, 1983, 83-1 CPD ¶ 349.

6. We agree with the OMD's determination that, at this juncture, the information requested by DCC is protected under Exemption 4 of the FOIA. The requested information shows the total prices proposed by the offerors for the base contract period in the initial procurement activity. The offerors have indicated that, because less than a year has elapsed between the initial award of the contract and the instant resolicitation, they may want to submit many of the prices included in their initial proposals. Thus, as noted by the offerors, this information would provide significant insight into their pricing strategy and adversely affect the offerors' competitive posture in the resolicitation. *See Raytheon Co. v. Department of the Navy*, No. 89-2481 (D.D.C. Dec. 22, 1989).

7. We also decline to disclose this information as a matter of our discretion. In this connection, we first note that, unlike the instant case, the GAO opinions cited by DCC involved situations where the unsuccessful offerors posed no objections to the release of their prices. Therefore, the instant situation is not analogous to the circumstances addressed in the GAO opinions. Second, we find no equitable basis for disclosing the information requested. DCC finds itself at a disadvantage only because its unit prices were published when it began performance of the contract. However, unlike the other offerors, DCC has had the advantage of performing the contract for almost six months (half of the base contract period), and this working knowledge should enable DCC to bid effectively in the resolicitation process. Finally, we note that, in these circumstances, DCC's competitive posture is much the same as it would have been had we awarded it the contract and later decided to resolicit after the base contract period had expired. In sum, we do not believe that fairness to DCC requires that we substantially disrupt the normal bidding process by diclosure of this pricing information.

8. In view of the foregoing, the Application for Review filed by Downtown Copy Center is denied. Downtown Copy Center may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

9. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] With some exceptions not applicable to this case, federal acquisition regulations require the disclosure of successful offerors' unit prices. *See* 48 C.F.R. §§ 5.303; 15.1001.

[2] *International Transcription Services, Inc. v. United States*, No. 90-3129, (D.D.C. Jan. 23, 1991).

[3] Exemption 4 is designed to protect "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Generally, information is considered confidential if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-304

In re Application of

EDENS BROADCASTING, INC. (WRBQ-FM)
Tampa, Florida

File No. BPH-830714AT

For a Construction Permit
for a major change

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; **Released: July 16, 1991**

By the Commission:

1. This case concerns the proposal of Edens Broadcasting, Inc., the licensee of WRBQ-FM, Tampa, Florida, to upgrade its facility by erecting a higher antenna tower at a new site. We now have before us a petition for reconsideration that Edens filed on May 21, 1990 and related pleadings. Edens urges us to reconsider our Memorandum Opinion and Order, 5 FCC Rcd 2576 (1990), in which we affirmed the Review Board's decision to deny Edens' captioned application, because the new antenna site that the application specifies is short-spaced toward the antenna of Station WEZY(FM) and Edens had failed to show that there was good cause for waiving the pertinent spacing requirement of 47 C.F.R. § 73.207(b)(1).

2. Edens correctly notes in its petition that the finding of short-spacing rests on the premise that WRBQ-FM and WEZY(FM) are both Class C stations and hence that § 73.207(b)(1) requires that their antennas be separated by at least 48 kilometers. That premise no longer holds true, according to Edens. It maintains that certain recent allocation rulings by the FCC's Mass Media Bureau indicate that it has tacitly reclassified WRBQ-FM's existing facility in downtown Tampa from Class C to Class C1. Edens argues that, if the FCC is thus treating WRBQ-FM's existing subpar facility as a Class C1 facility, then it must also treat WEZY(FM)'s existing subpar facility in Lakeland, Florida as a Class C1 facility for present purposes. Edens then points out that the new Class-C-to-Class-C1 minimum IF spacing requirement, which took effect on May 17, 1989,[1] is only 41 kilometers and that the actual distance between its proposed site and WEZY-FM's present antenna site is 42.3 kilometers. Thus, according to Edens, there is no further need to consider the sufficiency of its plea for waiver of § 73.207(b)(1), as its application is now in compliance with that rule. Edens therefore urges us to grant its application.

3. The Mass Media Bureau opposes the petition. The Bureau admits that it treated WRBQ-FM's Tampa facility as a Class C1 facility in connection with the allocation rulings that Edens cites, but it maintains that that was due to an error in its data base, that it will continue to classify WRBQ-FM's "existing allotment" as a Class C facility for as long as its instant application remains pending, and that WEZY(FM)'s "allotment" is also correctly classified as a full Class C facility at present.

4. Chapman S. Root Revocable Trust (Root), the licensee of WEZY(FM), argues that the controlling consideration is the Commission's decision in the *Report and Order in BC Docket No. 80-90*, 94 FCC 2d 152 (1983), recon. granted in part, 97 FCC 2d 279 (1984), to extend Class C status for substandard Class C stations whose licensees filed applications by March 1, 1987 to upgrade their facilities to full Class C standards, pending final disposition of those applications. Root maintains that both WRBQ-FM and WEZY(FM) are still Class C stations, because both Edens and Root filed upgrade applications prior to March 1, 1987 and those applications remain pending.

5. In reply, Edens agrees that its existing WRBQ-FM facility should still be rated as a Class C facility but disputes the opponents' contention that WEZY(FM) is also still a Class C station. It contends that Root's application to upgrade WEZY(FM)'s facility was not legally on file as of March 1, 1987, because the Bureau had previously dismissed it. While acknowledging that Root filed a timely petition for reconsideration of the dismissal which is still pending, Edens stresses that Root neither sought nor obtained a stay of the dismissal. Edens therefore contends that WEZY(FM) became a Class C1 station as of March 1, 1987 and accordingly reasserts that its own application for upgraded facilities at Riverview is now fully compliant with the spacing rule.

6. In a further pleading, Root contends that the Bureau has evidently stayed the dismissal of its upgrade application pending the outcome of this case. Root submits that it was appropriate for the Bureau to stay the action on its own motion. According to Root, it would be unfair to hold that it had been barred by the cut-off rule from filing an upgrade application, because it had no notice of the filing of Edens' Riverview application.[2]

7. Edens maintains in reply that it is clear that the Bureau did not stay the dismissal of Root's application, inasmuch as Root did not ask for such extraordinary relief and as the Bureau did not inform interested parties that it had taken such action. In any event, Edens argues that the dismissal of Root's application was proper and that Root's request for reinstatement of the application is devoid of merit.

DISCUSSION

8. Edens is raising a new argument based on facts of which it had notice well before the Commission denied its application for review. The most recent circumstance on which it relies is the adoption of the new C-to-C1 IF spacing requirement, which the Commission promulgated in April 1989, one year before it denied the application for review. Edens contends that its petition complies with Rule § 1.106(b)(2) because its "last opportunity to present such matters" was March 6, 1987, the day it filed its application for review. It could have apprised the Commission in the interim of the matters in question, though, and presented arguments as to their significance by filing a statement pursuant to Rule § 1.65, together with a supplement to the application for review. Therefore, its petition does not comply with § 1.106(b)(2).

9. In any event, there is no merit in Edens' argument that WEZY(FM) should be deemed to have been a Class C1 station since March 1, 1987 because Root's application to upgrade was not legally on file then. The *80-90* Report and Order did not say or imply that a sub-par Class C station would be rerated to Class C1 as of the March 1987 deadline unless an application to upgrade its facilities was technically "on file" as of that date; rather, it said that licensees "can protect their classification merely by filing an application to upgrade" prior to the deadline and that "[i]t is not necessary that the application be granted . . . by the deadline date." 94 FCC 2d at 178 ¶ 69. This plainly implied that a station whose licensee filed an application to upgrade prior to the deadline would not be reclassified before the application was finally disposed of. Root filed its upgrade application prior to the *80-90* deadline, and the application has yet to be finally disposed of. Whether the Bureau has or has not stayed the dismissal order is immaterial; what matters is that Root's reconsideration petition remains pending so that the Bureau is in a position, should it decide to grant the petition, to reinstate the application *nunc pro tunc*.

10. ACCORDINGLY, IT IS ORDERED that the motion filed on June 25, 1990 by Chapman S. Root for leave to file comments and the motion filed by Edens on July 12, 1990 for leave to file a reply thereto ARE GRANTED.

11. IT IS FURTHER ORDERED that the petition for reconsideration filed on May 21, 1990 by Edens Broadcasting, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Third Report and Order in MM Docket No. 86-144, Review of Technical Parameters for FM Allocation Rules*, 4 FCC Rcd 3557, 3560 ¶ 33 (1989).

[2] Edens' predecessor in interest filed the Riverview application in July 1983. The application was mutually exclusive with a previously-filed application for another channel in Sanibel, Florida with an announced cut-off date of July 14, 1983, the date when Edens filed the Riverview application. The Bureau later dismissed Edens' application but reinstated it *nunc pro tunc* in February 1985, waived the shortspacing toward WEZY(FM), and designated the application for hearing with the Sanibel applications. In response to motions from Root, the ALJ rescinded the waiver, set the waiver request for hearing, and granted Root leave to intervene. In March 1985, Root filed an application for a permit to upgrade WEZY(FM)'s facilities and move them from Lakeland to a site near Duette, Florida. The Bureau dismissed Root's Duette application for the reason that it was mutually exclusive with Edens' Riverview application and had been filed after the cut-off date for the consolidated proceeding in which Edens' application was being considered. Root argued in a petition for reconsideration which is still pending before the Bureau that the dismissal was improper because the Bureau had never announced that Edens' application had been accepted for filing. (The hearing on Edens' application was later severed from the Sanibel proceeding.)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WHDH-AM, INC. File No. BAL-890313EB

For Assignment of License of
WHDH(AM), Boston, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; Released: July 16, 1991

By the Commission:

1. The Commission has before it a petition filed by The Committee for Community Access ("CCA") on August 30, 1989, requesting reconsideration of the Commission's grant of a waiver of 47 C.F.R. §73.3555(b)(1) to WHDH-AM, Inc. ("WHDH") in connection with the grant of the above-captioned application for assignment of license from Channel Broadcasting, Inc. ("Channel") to WHDH. *WHDH (AM),* 4 FCC Rcd 5795 (1989).[1] CCA also requests reconsideration of the action of July 31, 1989, by the Chief, Audio Services Division, Mass Media Bureau, which dismissed by letter CCA's petition to deny Channel's application, pursuant to 47 C.F.R. §73.3584.[2]

2. On March 13, 1989, Channel filed an application for assignment of license of WHDH(AM) from Channel to WHDH that requested waiver of the one-to-a-market rule in connection with the proposed assignment. [3] The Commission accepted Channel's application for filing in a *Public Notice*, Report No. 14420, released March 23, 1989. On June 9, 1989, Channel notified the Commission that it had inadvertently failed to timely broadcast and publish local public notice of the pendency of its application as required by 47 C.F.R. §73.3580.[4] Thereafter, Channel reported that the parties had taken steps to comply with the local public notice rule.[5] On July 19, 1989, we granted the subject application for assignment of license of WHDH(AM), as well as the requested one-to-a-market rule waiver. On July 24, 1989, CCA filed its petition to deny Channel's application. By letter dated July 31, 1989, the staff dismissed CCA's petition.

3. CCA contends that the staff improperly characterized CCA's petition to deny Channel's application as untimely, and thereby prevented CCA from participating in the earlier stages of the proceeding.[6] Specifically, CCA assserts that Channel's failure to give local public notice of the pendency of its application within the time required by the local public notice rule invalidated the Commission's March 23, 1989 acceptance of the application, and that the 30-day period for the filing of petitions to deny never commenced. CCA also contends that a waiver of the one-to-a-market rule was not warranted.

DISCUSSION

4. We reject CCA's contention that Channel's failure to give timely local public notice of its pending application invalidated the staff's acceptance of the application. Section 309(b) of the Communications Act of 1934, as amended, requires that "no such application . . . shall be granted . . . earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application . . . ." *See* 47 U.S.C. §309(b). The public notice issued by the Commission pursuant to Section 309(b) notifies the public of the pendency of an application against which parties-in-interest may file a petition to deny.[7] Untimely petitions to deny are subject to return by the Commission's staff without consideration.[8] While our rules regarding local public notice are intended to more fully assure that the local community is apprised of the filing of an application, an applicant's failure to comply with the requirements of the rule in a timely fashion does not invalidate the public notice issued by the Commission pursuant to statute. The Commission on its own motion has waived strict compliance with the local public notice rule requirements in appropriate circumstances.[9]

5. Here, the Commission timely issued a public notice of the filing of Channel's application in accordance with statutory requirements. CCA also received notice of the likelihood that Channel would file the subject application from extensive local media coverage that attended the proposed sale of WHDH(AM).[10] Although such coverage did not excuse Channel from fulfilling its obligations under our local notice rule, Channel, in fact, has substantially complied with the requirements of the rule. This factor, coupled with the extensive media coverage of the impending sale and our issuance of a public notice of the acceptance for filing of the application, served to assure that the public was adequately apprised of the pendency of the proposal at the Commission. Further, not only did CCA file its petition to deny after the expiration of the thirty-day period following the Commission's release of the public notice of our acceptance of Channel's application, but its petition was filed more than thirty days after the completion of local public notice as well. For all these reasons, we find that CCA has failed to articulate any error of fact or law that would warrant reconsideration of the staff's dismissal of CCA's petition to deny as untimely. Moreover, CCA has failed to demonstrate why it could not have participated in the earlier stages of the proceeding. *See* 47 C.F.R. §1.106(b)(1).

6. Even assuming, *arguendo*, that CCA's petition to deny should not have been dismissed without consideration of its merits, CCA fails to demonstrate any error of fact or law that would warrant reconsideration of the Commission's grant of WHDH's request for waiver of the one-to-a-market rule. CCA disagrees with the Commission's determination that the Boston market meets the Commission's standard for one-to-a-market rule waivers.[11] Although CCA disputes neither the Commission's waiver criteria nor the facts to which we applied those criteria in the instant case, CCA contends that the absence of a full-time radio station in Boston with a format that serves the needs of the city's minority community demonstrates that that city lacks diversity of media outlets sufficient to justify grant of WHDH's request for waiver of the one-to-a-market rule. Consequently, CCA requests that the Commission refrain from sanctioning any concentration

of media control in the market until such time as a full-time "minority format" radio station becomes available.

7. WHDH established that Boston is the sixth largest market, and that the proposed combination of WNEV-TV and WHDH(AM) would not result in fewer than 30 separate voices being heard in the market. Applying the criteria applicable to requests for waiver of the one-to-a-market rule, *see* n. 11, *supra*, we granted WHDH's waiver request.[12] Moreover, CCA presents no evidence in support of its allegation that it is adversely affected by the Commission's grant of the subject request for waiver. Although CCA suggests that any concentration in control of ownership of media outlets in the Boston market will inhibit the development of a full-time "minority format" radio station, CCA submits no evidence in support of this conclusion. CCA submits a letter from a member of Boston's city council reiterating CCA's assertion that Boston needs a full-time radio station which serves the needs of the city's minority community. CCA itself, however, acknowledges the well-established Commission policy that the marketplace, and not the Commission, will determine the allocation of radio formats. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *see also In re Riverside Broadcasting, Inc.*, 53 RR 2d 1154 (1983), *recon. denied*, 56 RR 2d 618 (1984), *remanded on other grounds, Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985). Further, even assuming that the Boston market lacks a full-time radio station with a format that can be characterized as "minority-oriented," a substantial factual question is not presented. By itself, the absence of such a station does not demonstrate the failure of the marketplace to serve the listening needs of the minority community. In this regard, CCA has not presented any evidence to show that those needs are not being met by the radio stations licensed in that market. Although in the *Second Report and Order* the Commission left "open the possibility that petitioners who submit petitions to deny might be able to rebut the request for a one-to-a-market waiver," we find the evidence provided by CCA insufficient to overcome the presumption that the Boston market enjoys diversity sufficient to support grant of the requested waiver, or to demonstrate that Commission's grant of WHDH's request for waiver is otherwise inconsistent with the public interest.

8. Accordingly, IT IS ORDERED, that, pursuant to 47 C.F.R. §1.106, the Petition for Reconsideration filed by The Committee for Community Access IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. §73.3555(b)(1), hereinafter referred to as the "one-to-a-market" rule, prohibits the common ownership of radio and television broadcast stations in the same market if the 2 mV/m groundwave contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] 47 C.F.R. §73.3584(a) provides in relevant part that "[i]n the case of applications for transfers and assignments of construction permits or station licenses, Petitions to Deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the applications."

[3] WHDH is a subsidiary of New England Television Corporation, which, through a subsidiary, is the licensee of WNEV-TV, Boston, Massachusetts. Absent waiver thereof, the one-to-a-market rule would bar New England Television Corporation from having an attributable interest in both WHDH(AM) and WNEV-TV.

[4] 47 C.F.R. §73.3580, hereinafter referred to as the "local public notice" rule, provides in relevant part that "local public notice must be completed within 30 days of the tendering of the application." *See* 47 C.F.R. §73.3580(c).

[5] By letter dated June 15, 1989, Channel notified the Commission that WHDH(AM) aired the notice required by 47 C.F.R. §73.3580(d) on June 9, 10, 11 and 12, 1989. By letter dated June 20, 1989, Channel notified the Commission that it published the notice required by 47 C.F.R. §73.3580(c) in *The Boston Globe* on June 14, 15, 19 and 20, 1989.

[6] 47 C.F.R. §1.106(b)(1) requires that a petition for reconsideration filed by a person who is not a party to the proceeding shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible to participate in the earlier stages of the proceeding.

[7] *See* 47 C.F.R. §73.3564(c); *see also* 47 U.S.C. §309(d)(1).

[8] *See* 47 C.F.R. §73.3584(d).

[9] *See In re Seattle Public Schools (KNHC (AM))*, 103 FCC 2d 862, 868 (1986); *see also In re Edward G. Atsinger III*, 29 FCC 2d 443, 446-47 (Rev. Bd. 1971).

[10] By letter to the Commission dated June 15, 1989, Channel submitted articles reporting on the proposed sale of WHDH(AM) that appeared in *The Boston Globe*, *The Boston Herald Traveler*, *New England Advertising Week*, *The Boston Business Journal*, *Electronic Media* and *Inside Radio* on January 13, 16, 23 and 27, 1989. In addition, both Channel and CCA acknowledge in their respective pleadings that CCA's chairman discussed the sale of the station in a meeting with the president of WHDH in February, 1989.

[11] The Commission has stated that it will look favorably upon waiver requests involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed merger. *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989).

[12] *WHDH(AM)*, 4 FCC Rcd 5795. *Accord*, *WHRC(TV)*, 5 FCC Rcd 3789 (1990); *WKLR(FM)*, 5 FCC Rcd 87 (1989); and *WMMR(FM)*, 4 FCC Rcd 8343 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-86

In re Applications of

GREAT LAKES BROADCASTING, INC.	File No. BPH-870327KA
HURON COMMUNICATIONS COMPANY LIMITED PARTNERSHIP	File No. BPH-870331OB
THOMAS W. ROBERTS	File No. BPH-870331PF
NCB ENTERPRISES, INC.	File No. BPH-870410KC
LUIPOLD BROADCASTING, INC.	File No. BPH-870415MO

For Construction Permit for a New FM Station, Channel 241A, Huron, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: July 2, 1991; Released: July 16, 1991

By the Commission:

1. ALJ Gonzalez denied a late-filed Petition to Enlarge Issues by Huron Communications Company Limited Partnership (HCCLP), FCC 90M-677 (Apr. 3, 1990), and in his Initial Decision, *Great Lakes Broadcasting, Inc.*, 5 FCC Rcd 2919 (1990), granted the application filed by Firelands Broadcasting Corp. (Luipold)[1] for a new FM station at Huron, Ohio. The Review Board, however, found that questions were raised concerning whether Luipold falsely certified that it had reasonable assurance for its proposed transmitter site and whether it had reasonable assurance of availability for the site originally designated in its application, and the Board remanded this proceeding for further hearings on its qualifications to be a licensee. *Great Lakes Broadcasting, Inc.*, 5 FCC Rcd 7003 (1990).[2]

2. Luipold argues that the Board, in remanding its application, failed to address procedural deficiencies in HCCLP's petition to enlarge issues.[3] It asserts that HCCLP failed to allege new or newly discovered facts as required by 47 C.F.R. § 1.229. It argues that the Board's ruling was in conflict with the goals of *Proposals to Reform the Commission's Comparative Process to Expedite the Resolution of Cases (Hearing Reform Order)*, 6 FCC Rcd 157, 161 ¶ 30 (1991), where the Commission held that ALJs and the Review Board are expected to strictly adhere to the standards established in Section 1.229. Luipold also asserts that overturning the Board's ruling will conserve resources and expedite service to the public by avoiding the need for additional hearings. HCCLP argues that its petition to enlarge issues was timely and that, in any event, it has raised questions of probable decisional significance and such substantial importance as to warrant consideration even if its petition was untimely. *See* Section 1.229(c).

3. *Waiver of 47 C.F.R. § 1.115(e)*: The remand of Luipold's application is an interlocutory action. A party seeking review of an interlocutory ruling under 47 C.F.R. § 1.115(e) has a heavy burden of establishing that the resulting disruption of the proceeding is outweighed by compelling and urgent circumstances which could not be considered by the presentation of arguments in accordance with that rule. *George E. Cameron, Jr. Communications*, 51 RR 2d 1419, 1420 (1982); *Rocket Radio, Inc.*, 58 FCC 2d 663, 664 (1976).

4. Luipold has met the heavy burden of showing that a waiver of the proscription against interlocutory appeals under Section 1.115 of the Rules is warranted. HCCLP's petition to enlarge issues was procedurally defective because it was grossly untimely and HCCLP has not raised a question of probable decisional significance and substantial public importance. Moreover, a grant of the Petition for Extraordinary Relief will conserve the resources of the Commission and the parties by avoiding the need for further proceedings concerning this matter.

5. *Timeliness of HCCLP's Request to Enlarge Issues*: Luipold's application proposed a tower owned by Robert Barnes, Barnes Nursery, and it listed his phone number and stated that the tower on the site would be replaced with a taller tower. Barnes is a principal of NCB Enterprises, Inc., an applicant in this proceeding. On June 3, 1987, Barnes wrote Mrs. Luipold advising her that he had never agreed to a lease or the construction of a new tower and that because he was a shareholder in NCB he would not grant Luipold a lease.[4] HCCLP's Opposition to Petition for Extraordinary Relief, Attachment 3. Luipold then promptly amended its application to specify a new site on June 22, 1987. HCCLP's motion to enlarge issues was not filed until November 18, 1988, after the hearing record was closed.

6. We find HCCLP's request untimely. Of particular significance here are the facts that Barnes, as a principal in one of the applicants in this proceeding, had knowledge of all of the relevant circumstances and that each of the other applicants could reasonably have discovered those circumstances well before these applications were designated for hearing. Thus, HCCLP was aware from Luipold's application that it intended to build a new tower on Barnes' property; that Barnes was listed in NCB's application as a 25 per cent owner and Vice-President; and that on June 22, 1987, Luipold abandoned its proposed site and designated a new site. The fact that Luipold abandoned a site owned by a principal of a competing applicant approximately two months after it specified that site, and well before these applicants were designated for hearing, reasonably provided grounds from which HCCLP could have learned the facts concerning the change in Luipold's proposal.

7. In spite of these facts, HCCLP did not petition to enlarge issues before the hearing began. Instead, it waited until after the hearing record was closed to file a motion with the ALJ seeking designation of issues concerning Luipold's original site. That motion was denied by the

ALJ because it was "grossly untimely." FCC 90M-677, released April 3, 1990. HCCLP has not adequately explained why it could not have raised its concerns about Luipold's transmitter site in a timely manner. The facts were fully known to NCB, they were readily discoverable by the other applicants, and they were fully disclosed as part of the discovery process. HCCLP had a full opportunity to investigate such matters so that they could be promptly addressed in an orderly fashion during the hearing. *See Omaha TV 15, Inc.*, 4 FCC Rcd 730 ¶ 6 (1988). It would undermine the efficiency of the Commission's processes if we were, under the circumstances of this case, to allow HCCLP to benefit from its failure to take full advantage of the prehearing procedures. HCCLP's further argument that its motion was timely because it relied on hearing testimony is without merit because it has failed to cite any testimony disclosing significant facts that were not previously disclosed in the June 3, 1987 letter from Barnes[5] and because it has not made any showing of facts that it could not have reasonably discovered before the hearing started.

8. *Compliance with Section 1.229 (c)*: In view of the dilatory nature of HCCLP's petition, we must determine if that petition complies with standards set forth in Section 1.229(c). Section 1.229(c) provides for consideration of a late-filed petition to modify issues only if it raises a question of probable decisional significance *and* such substantial public interest importance as to warrant consideration in spite of its untimely filing. In *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 856, 874 ¶ 23 (1976), the Commission stated that this standard will be strictly construed and that motions for modification of the issues must be filed promptly after the facts are known or *could reasonably have been known* to the moving party. Finally in *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1965), the Court stated that "[o]rderliness, expedition and finality in the adjudicatory process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own."

9. Issues of "substantial public importance" would include questions concerning Luipold's basic qualifications. A showing "of probable decisional significance" requires that HCCLP establish that the "likelihood of proving the respective allegations therein is so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission's business." *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 148-49 (Rev. Bd. 1966).[6] Therefore, this proceeding may be remanded for additional hearings only if, in accordance with the strict application of the standards of Section 1.229(c), we find a likelihood that potentially disqualifying allegations will be proven. The Board remanded this case for consideration of two potentially disqualifying issues as to Luipold. We assess each of these issues in turn under this standard.

10. *Luipold's Reasonable Assurance*: As noted above, the Board specified a basic qualification issue concerning whether Luipold had reasonable assurance of transmitter site availability. HCCLP argues that, where utilization of an existing site will require renovation of the site, no reasonable assurance can be found unless the applicant first obtains permission to make the necessary changes, citing *Milan and Lansman*, 4 RR 2d 469, 472 (Rev. Bd. 1965). Luipold's amendment specifying a new site was filed within thirty days of the *Public Notice*, Report No. 13925, released May 21, 1987, which announced the "acceptance for tender" of Luipold's application. Thus, the amendment was filed as of right under 47 C.F.R. § 73.3522(a)(6) and it mooted any deficiency in Luipold's reasonable assurance concerning its original site. Because Luipold filed a amendment as of right, there is no basis for addition of an issue concerning whether Luipold had reasonable assurance when it filed its application, *see Scioto Broadcasters, Limited Partnership*, 6 FCC Rcd ¶ 2 (1991), and other cases cited by HCCLP involving site changes at later stages of proceedings are not relevant here.

11. *Luipold's Candor*: The Board also designated a basic qualification issue concerning whether Mrs. Luipold falsely certified Luipold's reasonable assurance of site availability. An issue concerning Luipold's candor would not be warranted if Mrs. Luipold had acted reasonably and in good faith in certifying access to Barnes' transmitter site. *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 7651 (1990); *National Innovative Programming Network of the East Coast*, 2 FCC Rcd 5641, 5643 ¶ 11 (1987) (informal telephone contacts by the applicant's agents with details to be negotiated at a future date are sufficient to provide a good faith belief of site availability).

12. The facts in this case indicate that Mrs. Luipold was acting reasonably and in good faith when she certified her site availability, and HCCLP has not alleged facts, which if true, would demonstrate that she did not act in good faith. The record indicates that during the first part of April 1987, Mrs. Luipold asked Jay Wagner, a non-voting shareholder who was an experienced broadcaster, to locate and get oral assurance for a lease for a transmitter tower. Tr. 350. She asked for his assistance because she was busy with the preparation of Luipold's application. Tr. 356. Wagner advised Mrs. Luipold that he had called Barnes and gotten permission to use Barnes's transmitter site. Mrs. Luipold immediately attempted to confirm that Luipold had reasonable access to Barnes' tower. She called Barnes twice and left messages. Tr. 350. On April 15, 1987, after Barnes failed to return her calls, she wrote him a letter setting forth the terms for a lease and offering to pay for any modifications to the tower. She said that Wagner had told her that a rental of $500 per month had been agreed upon. Opposition to Petition for Extraordinary Relief, Attachment 2. On June 3, 1987 Barnes reponded to Mrs. Luipold's letter acknowledging that he had discussed a reasonable rental rate with Wagner, but asserting that he never agreed to a lease or the construction of a new tower and that because he was a stockholder in NCB he would not grant Luipold a lease. Opposition to Petition for Extraordinary Relief, Attachment 3. Luipold then promptly amended its application to specify a new site. On November 17, 1988 Barnes executed a declaration under penalty of perjury in which he acknowledged talking to Wagner, but asserted that he told Wagner he was not in a position to discuss what would be a reasonable rental, that he told Barnes that he did not know if there was space available on the tower, and that Wagner never asked him if Barnes would lease tower space to Wagner or his group. Opposition to Petition for Extraordinary Relief, Attachment 3.

13. Thus, it is undisputed that Mrs. Luipold relied on Wagner to help her locate a transmitter site, that Wagner made an initial contact with Barnes, that there was a discussion concerning reasonable rental, that Wagner told Mrs. Luipold that he had received permission from Barnes, and that Mrs. Luipold promptly moved to finalize

an agreement with Barnes. HCCLP does not cite any record facts that would indicate that Mrs. Luipold knew either that Barnes was affiliated with a competing applicant before NCB filed its application on April 10 or that the site would not be available until after the June 3 letter. Indeed, Barnes in his declaration does not claim to have told Wagner about his affiliation with NCB.

14. The only question of fact raised by the record is the differing interpretation of the conversation between Wagner and Barnes. However, both parties agree that a rental figure was discussed.[7] The record indicates that Wagner told Mrs. Luipold that he had secured permission, and HCCLP has not cited any facts indicating that it is likely to prove that Mrs. Luipold's reliance on Wagner was unreasonable or that Mrs. Luipold intended to mislead the Commission or the parties. Thus, HCCLP has failed to meet the test for addition of a candor issue at this late stage of the proceeding.

15. We believe that the Board and ALJs should strictly enforce the provisions of Section 1.229, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not reasonably have been discovered earlier, in order to expedite the hearing process and the institution of new service. Granting HCCLP's motion to enlarge issues would undermine these goals by reopening the record in order to provide HCCLP with an opportunity to present additional evidence concerning prior circumstances which could readily have been discovered and heard before the record was closed. *See Cleveland Television v. F.C.C.*, 732 F.2d 962, 973 n.13 (D.C. Cir. 1984); *see also Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (no judging process could operate efficiently or accurately if an applicant is allowed to sit back and hope for a decision in its favor and to parry with an offer of more evidence when faced with an adverse decision); and *Hearing Reform Order*, 6 FCC Rcd at 161 ¶ 30, affirming the Commission's policy of strictly adhering to the standards of Section 1.229. Luipold has reasonable assurance for its current site, and its proposal was preferred by the ALJ in his Initial Decision. Thus, we grant review and vacate the Board's ruling.[8]

16. ACCORDINGLY, IT IS ORDERED, That 47 C.F.R. § 1.115 IS WAIVED[9] and that the Petition for Extraordinary Relief, filed January 4, 1991 by Firelands Broadcasting Corp. (Luipold Broadcasting, Inc.) IS GRANTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Review Board Memorandum Opinion and Order, *Great Lakes Broadcasting, Inc.*, 5 FCC Rcd 2919 (Rev. Bd. 1990) and the ALJ's Memorandum Opinion and Order, FCC 91M-1188, released April 4, 1991, ARE VACATED; the application of Luipold Broadcasting, Inc. (File No. BPH-870415MO) IS REINSTATED; and the Review Board IS DIRECTED to consider the record in this proceeding in light of our rulings in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In an Order, FCC 91M-317, released January 28, 1991, the ALJ approved an amendment changing the name of Firelands Broadcasting Corp. to Luipold Broadcasting, Inc.

[2] Following the Board's remand order, the ALJ considered Motions for Summary Decision concerning the issues added by the Board. By his order, FCC 91M-1188, released April 4, 1991, the ALJ granted summary decision, resolved the site availability issue against Luipold, and dismissed Luipold's application. For the reasons set forth below, we will on our own motion, pursuant to 47 C.F.R. § 1.117(a), vacate the ALJ's order and reinstate Luipold's application.

[3] Now before the Commission are a Petition for Extraordinary Relief filed January 4, 1991 by Firelands (Luipold); Oppositions filed Januaary 14, 1991 by HCCLP and NCB Enterprises, Inc.; and a Reply filed January 25, 1991 by Firelands (Luipold).

[4] Luipold produced the letter on October 5, 1988 as part of the discovery procedures in this proceeding.

[5] The testimony cited by HCCLP consists of Mrs. Luipold's testimony that she asked Jay Wagner, a non-voting shareholder in Luipold, to locate a site (Tr. 350), and Wagner's testimony that he did not discuss the need to erect a taller tower with Barnes (Tr. 484-97). This testimony merely confirms the statement in Barnes' June 3, 1987 letter that "the subject of a new tower was never broached in my conversations with Mr. Wagner."

[6] In the Rule Making that ultimately led to the present Section 1.229(c), the Commission proposed that allegations "be limited to issues related to the basic statutory qualifications of the applicant" and that petitioners should be required to "demonstrate that the allegations are likely to be proved" as a condition for granting an untimely petition to modify issues. *Notice of Proposed Rule Making*, FCC 75-1250, 40 F.R. 54436, released November 14, 1975.

[7] In spite of Barnes's affidavit, his June 3, 1987 letter to Mrs. Luipold acknowledged that they "did have conversation regarding what might be a reasonable rental for such a tower. . . ." Opposition to Petition for Extraordinary Relief, Attachment 2.

[8] The ALJ's order discussed in note 2, *supra*, did not address the facts that Luipold's June 22, 1987 amendment was filed as a matter of right under 47 C.F.R. § 73.3522(a)(6) and that as noted in paragraph 10, *supra*, any deficiency in Luipold's reasonable assurance concerning its original site was thereby rendered moot. Thus, the ALJ's adverse resolution of the site availability issue and his dismissal of Luipold's application based on that determination were unfounded. Although that dismissal order did not consider the Board's false certification issue, the ALJ twice reiterated his view that Luipold had acted in the good faith belief that the originally proposed transmitter site would be available to the applicant for its intended purpose.

[9] This ruling should not be interpreted as lessening our resolve to discourage interlocutory appeals and to enforce Section 1.115(e) of the Rules. We continue to believe that interlocutory appeals are generally disruptive and serve to delay the completion of the hearing process. It is only where an order to be appealed is patently defective and will delay the completion of the hearing process, and the grant of review will demonstrably serve to expedite the resolution of the hearing, that we will waive Section 1.115(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-240

In re Applications of

ALBERT E. GARY	File No. BPH-851029MH
KILLINGTON BROADCASTING, LTD.	File No. BPH-851030MN
MOUNTAIN BROADCASTING LIMITED PARTNERS	File No. BPH-851030MP
ELF BROADCASTING COMPANY	File No. BPH-851030MQ

For Construction Permit for a
New FM Station on Channel 287C2,
in Killington, Vermont

Appearances

William H. Crispin, Esq. and *Dean R. Brenner, Esq.*, on behalf of Killington Broadcasting, Ltd. and *Charles E. Dziedzic, Esq.*, and *Y. Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: July 9, 1991; Released: July 17, 1991

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision that was filed on May 17, 1991, and on a related Joint Petition For Approval Of Settlement Agreements filed on May 22, 1991, as supplemented on May 23, 1991. On June 5, 1991, there was filed the Mass Media Bureau's Consolidated Comments In Support Of Joint Petition For Approval Of Settlement Agreements And Motion For Summary Decision. The issue is now joined for decision. 47 C.F.R. §1.251.

2. The Presiding Judge initially decided after trial that the CP be awarded to Killington Broadcasting, Ltd. ("KBL"). *See Albert E. Gary, et al.*, 5 F.C.C. Rcd 323 (Admin. L.J. 1990). The Review Board found "several basic terms" were missing from KBL's bank letter. *Albert E. Gary, et al.*, 5 F.C.C. Rcd 6235, 6237 (Review Bd 1990). The Board also was dissatisfied with a principal's "self-serving and fragmentary testimony" that was not corroborated by a bank official. *Id.* Therefore, the case was remanded in order to take evidence on the following issues:

> A. To determine whether KBL falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee; and
>
> B. To determine whether KBL is financially qualified to be a Commission licensee.

3. The Review Board also required that on the remand, KBL must show that:

> the "individual qualifications" of the borrower have been primarily reviewed, *Christina Communications*, 2 FCC Rcd. 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

See 5 F.C.C. Rcd at 6236 (*quoting Scioto Broadcasters*, 5 F.C.C. Rcd 5158, 5160 (Review Bd 1990). As shown below, the testimonial evidence submitted by KBL in support of its Motion meets the burden of proof on the issues and provides substantial evidence in the record to support a favorable decision and the grant.[1]

Findings of Fact

4. KBL is a limited partnership organized under the laws of Vermont. Daniel W. Ewald ("Ewald") is its sole general partner and Walter J. Sczudlo ("Sczudlo") is the sole limited partner. Equity is divided with 20% for Ewald and 80% for Sczudlo. *See Id.* at Para. 46.

5. Roderick Phillips, Jr. ("Phillips") is assistant vice-president at the Marble Bank. Ewald has an account at the Marble Bank. Ewald and Phillips have known each other since 1984. (Phillips Depo. at 14, 47.) Phillips had signed a letter on behalf of the Marble Bank dated October 29, 1988, which was intended to give KBL an assurance of a loan for $500,000 to construct and operate. (Phillips Aff. Attachment.)

6. Ewald had approached Phillips in 1985 for a loan to build a house for speculation. (Ewald Depo. at 23; Phillips Depo. at 9-10.) In connection with that contemplated financing, Ewald had furnished Phillips detailed personal financial statements. (Ewald Depo. at 47, 50-51; Phillips Depo. at 10.) This post-hearing testimony is consistent with Ewald's testimony at the hearing:

> The bank already [had] background financial information about me when they wrote this letter.

(Ewald, Tr. 336.)

7. The evidence reflects that Phillips knew Ewald's financial condition and that he was familiar with Ewald's real estate holdings In Plymouth:

> I'm very familiar with these lots. I know where all this land is. I know exactly where it is.

(Phillips Depo. at 42.) Phillips also knew the purpose for Ewald's 1985 financial needs and they discussed whether contemplated improvements on the land should be paid for with Ewald's personal funds. (Ewald Aff. at Para. 2.) Ewald decided to use his own funds. (*Id.*) Ewald's personal financial statement of 1985 showed a net worth of approximately $346,000.

8. Ewald had made cost estimates for the KBL venture. By October 1985, Ewald had compiled cost estimates for construction and operation of KBL's station based on research that he had begun in 1982 concerning the construction of a new radio station in Killington. (*See* Ewald Depo. at 5; Ewald, Tr. 347.) By October 1985, Ewald had obtained cost figures based upon discussions with an engineering firm. (Ewald Depo. at 7; Ewald, Tr. 347-348.) He estimated that KBL needed $300,000 for construction and operating costs and $200,000 to prosecute the application. (Phillips Depo. at 22, 29.)

9. Ewald and Phillips met on at least two occasions in October 1985 to discuss the station's financing. (Ewald Depo. at 8, Phillips Depo. at 19-20, 30, 34.) Ewald told Phillips that he would be looking for bank financing. (Ewald Depo. at 9.) Ewald described the application process to Phillips as an expected three-year undertaking and he told Phillips about the above construction/operation costs. (Phillips Depo. at 20-23.) Ewald and Phillips discussed the term of a loan (7 years) its interest rate (2% above prime) and collateral (station's equipment and Ewald's land). (Ewald Depo. at 47-48; Ewald Aff. at Paras. 2-3; Phillips Depo. at 29, 36; Phillips Aff. at Para. 2.)

10. It was recognized that these terms could change and because of the uncertainty of what final terms would be in years hence, they were not included in the bank's letter. (Phillips Aff. at Para. 2.) Phillips had Ewald's financials on file and he discussed the loan with the bank's senior loan officer who approved the bank's interest in making such a loan. (Phillips Depo. at 27, 39, 43.) Based on financial information about Ewald that was on file and the value of Ewald's land, the bank's senior lending officer decided to issue The Marble Bank letter to Ewald on October 29, 1985. (Phillips Depo. at 27-28; Phillips Aff. w. letter attached).

11. Ewald has received favorable loan treatment from Marble Bank since 1985. In 1986, the bank loaned him $98,000 to build a house in Rutland based on Ewald's tax returns and a credit check. (Ewald Depo. at 15-17; Phillips Depo. at 12.) Improvements made on Ewald's properties have increased their value as collateral and Ewald has paid down over 90% of his $200,000 prosecution costs. (Ewald Aff. at Para. 6.) And Sczudlo has agreed to pledge $300,000 in CDs to further secure the loan. As a result, Phillips has reaffirmed the bank's willingness to extend a loan to KBL in 1985 and now. (Sczudlo Aff. at Para. 3; Phillips Aff. at Para. 5; Ewald Aff. at Para. 6.)

CONCLUSIONS OF LAW

12. The bank letter does not account for all of the basic elements needed for a reasonable assurance. But it does give an assurance that the Marble Bank may be willing to loan KBL up to $500,000. And this letter at least infers familiarity with Ewald's financial condition since there is an express condition that there be no material adverse change. The sworn testimony of Ewald, corroborated by Phillips, establishes that the length of a loan, interest and collateral were all discussed in 1985 and that the bank had Ewald's financials on file. There has been subsequent loans made and the bank appears satisfied with the value of Ewald's properties and Sczudlo's CDs that will serve as collateral. And Phillips has provided an unequivocal reaffirmation of the bank's present intention to loan KBL the necessary funds. (Phillips Aff. at Para. 6.)

13. Phillips' affirmation meets the standard of "present firm intention to make a loan, future conditions permitting - - -." *Merrimack Valley Broadcasting, Inc.*, 82 F.C.C. 2d 166, 167 (Comm'n 1980). The Board's concern about uncorroborated self-serving testimony has been fully addressed with Phillips' testimony. The Bureau's argument is accepted that "[i]t is now beyond dispute that KBL was financially qualified when it so certified, and it remains so." *See* Bureau Comments at 3.

14. In view of the consistent testimony of Ewald and Phillips on terms and conditions, the absence of tentative basic terms in the letter will not preclude a finding that KBL was and is financially qualified. *Cf. A. P. Walter, Jr., et al.*, 6 F.C.C. Rcd 875, 877 (Review Bd 1991). Thus, no material issue of fact remains and summary decision in KBL's favor is warranted. *Big Country Radio, Inc.*, 50 F.C.C. 2d 967 (Review Bd 1975).

SETTLEMENT

15. The settlement agreement contemplates the grant of KBL's application and the dismissal of the application of Gary, Mountain and Elf in exchange for monetary consideration (Gary - $90,000; Mountain - $90,000; and Elf -$170,000).

16. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

17. The Joint Petition was filed timely in accordance with §73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules. Also, the Bureau has no objection to approving the settlement.

18. There has been compliance with the local publication requirements of the Commission's rules. 47 C.F.R. §73.3594(g). The parties have paid the required hearing fees. 47 C.F.R. §1.221(g). The public interest will be served by approval of this agreement which will eliminate the need for further litigation and the corresponding utilization of resources, and which ensures that a new FM service will be delivered to Killington, Vermont at an earlier date. Accordingly, it is appropriate and in the public interest that the proposed settlement be accepted.

RULINGS

IT IS ORDERED that the Motion For Summary Decision filed on May 17, 1991, by Killington Broadcasters, Ltd. IS GRANTED and the remanded financial and misrepresentation issues ARE RESOLVED in the applicant's favor.

IT IS FURTHER ORDERED that the Joint Petition For Approval Of Settlement Agreements filed on May 22, 1991 IS GRANTED and the Settlements ARE ACCEPTED.

IT IS FURTHER ORDERED that the applications of Albert E. Gary (File No. BPH-851029MH), Mountain Broadcasting Limited Partners (File No. BPH-851030MP), and Elf Broadcasting Company (File No. BPH-851030MQ) ARE DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Killington Broadcasters, Ltd. (File No. BPH-851030MN) for a construction permit for a new FM Station on Channel 287C2 at Killington, Vermont IS GRANTED.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Testimonial evidence filed on May 22, 1991 includes: Deposition of Daniel W. Ewald (January 29, 1991); Deposition of Roderick Phillips, Jr. (January 29, 1991); Excerpts of Hearing Transcript (Tr. 336, 347-48); Affidavit of Daniel W. Ewald (April 30, 1991); Affidavit of Roderick Phillips, Jr. (April 30, 1991); Declaration of David Ewald (March 11, 1991); and Declaration of Walter J. Sczudlo (March 12, 1991).

[2] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-243

In re Application of

WEINER BROADCASTING COMPANY — File No. BPIB-840904MZ

For a Construction Permit for a New International Broadcast Station at Monticello, Maine

Appearances

Michael Couzens, on behalf of Weiner Broadcasting Company; and *Robert A. Zauner*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: July 9, 1991; Released: July 16, 1991

PRELIMINARY STATEMENT

1. This proceeding concerns the application, as amended, of Weiner Broadcasting Company (WBC) for a construction permit for a new international broadcast station at Monticello, Maine. As reflected in the Hearing Designation Order (HDO), Allen H. Weiner is the President of WBC, former licensee of Station WOZW(AM), Monticello, Maine, Station WOZI(FM), Presque Isle, Maine; and Remote Pickup Base Station KPF-941, Yonkers, New York. By *Order to Show Cause and Notice of Apparent Liability* (*MM Docket No. 85-109)*, 50 Fed. Reg. 20603, published May 17, 1985, the Commission ordered Weiner and WBC to show cause why the licenses for these stations should not be revoked. Before a hearing could be held, applications for the assignment of the AM and FM stations, pursuant to the Commission's distress sale policy, were granted and Weiner was ordered to surrender the KPF-941 license. *See, Memorandum Opinion and Order*, MM 4010, released April 24, 1986. As a consequence, the proceeding was terminated, leaving a number of issues against WBC and Weiner unresolved. The *HDO* in the instant proceeding specified that the following unresolved issues were to be heard and incorporated into this proceeding the basis for the addition of those issues.

a. To determine whether Weiner operated a radio station on 1616 kHz in Monticello, Maine, at various times from January 31, 1982, through July 16, 1984, without Commission authorization, in violation of Section 301 of the Communications Act of 1934, as amended;

b. To determine whether Weiner and/or WBC refused to allow an inspection of Station WOZW(AM), Monticello, Maine, on May 3, 1984, by an authorized representative, in violation of Section 73.1225 of the Commission's Rules;

c. To determine whether Weiner and or WBC failed to comply with the then prevailing main studio location requirements of Section 73.1125 of the Commission's Rules;

d. To determine whether Weiner and/or WBC operated Remote Pickup Base Station KPF-941, Yonkers, New York, to broadcast directly to the public on 1622 kHz, in violation of the permitted uses for remote pickup base stations as stated in then-prevailing provisions of Sections 74.431(e), 74.43(g), 74.432(c)(2), 74.432(c)(5), and 74.432(g) of the Commission's Rules.

e. To determine whether Weiner and/or WBC misrepresented to the Commission that the transmitter to be used for Remote Pickup Station KPF-941, Yonkers, New York, would comply with the then-prevailing type acceptance criteria of Section 74.451(a) of the Commission's Rules.

2. In addition to specifying the unresolved issues from the earlier proceeding, the HDO stated that the Commission had information that from on or about July 23, 1987, to July 25, 1987, Weiner had been involved in unlicensed broadcast transmissions from aboard the vessel Sarah, located in international waters off the coast of Long Island, New York. Such transmissions were received in the United States. On July 25, 1987, the Commission delivered a warning to Weiner aboard the Sarah informing him that the broadcasts were illegal. Weiner, however, ignored the warning and continued to broadcast until Commission personnel and officers of the Coast Guard boarded the vessel and arrested Weiner. Consequently, the HDO specified the following issue concerning Weiner's activities aboard the Sarah:

f. To determine whether Weiner, from on or about July 23, 1987, to on or about July 28, 1987, aboard a vessel in international waters and without a license engaged in operating broadcast stations the transmissions of which were received in the United States in violation of Article 30, Section 1(1), Section 2665, of the Radio Regulations of the International Telecommunications Union of the United Nations.

3. The HDO included the following ultimate issues related to each of the above enumerated issues.

g. To determine, based on the evidence adduced pursuant to the foregoing issues, whether Weiner and/or WBC possess(es) the requisite character qualifications to be a Commission licensee;

h. To determine, based on the evidence adduced pursuant to the foregoing issues, whether the application should be granted.

4. The HDO placed the burden of proceeding with the introduction of evidence with regard to issues (a) - (f) on the Mass Media Bureau. The burden of proceeding with

the introduction of evidence on issue (g) was placed on WBC. Finally the burden of proof on issues (a) - (h) was placed on WBC.

5. A prehearing conference was held on July 17, 1990. A hearing was held on October 4, 1990, and at the conclusion thereof the record was closed. The Bureau and WBC filed proposed findings and conclusions on December 17, 1990; replies were filed January 22, 1991.

FINDINGS OF FACT

Background

WBC's Corporate Ownership

6. WBC is currently 100% owned by Allan Weiner who has owned all of WBC's stock since 1985. Prior to 1985, Weiner owned 51% of the stock and his father owned the remaining 49%. Tr. 38-39. Weiner is the sole officer of WBC which has no ongoing business other than the prosecution of the application which is the subject of this proceeding. Tr. 39.

Falling Star Network

7. Weiner's first involvement with broadcasting occurred in the early 1970's when at the age of 17, he, along with a friend, Joseph Paul (J.P.) Ferraro, started the Falling Star Network. This "network" consisted of two unlicensed radio stations operating on alternate days of the week on 87.9 MHz (FM) and 1620 kHz(AM), from the city of Yonkers, New York. Weiner operated one station using the call letters WXMN, and Ferraro operated the other using the call letters WFSR. Tr. 41-42; MM Ex. 1, p. 2, Admission 5.

8. Before going on the air, Weiner and Ferraro had visited the FCC's field office in New York City and asked if there was any way they could obtain a license. They were told that they could not obtain a license because of the legal and other costs involved. Tr. 49. In light of the high cost of acquiring a broadcast station Weiner felt that the only way he could become a broadcaster was to broadcast illegally. Tr. 48.

9. By letter dated January 25, 1971, the engineer in charge of the Federal Communications Commission's New York City office, Henry Paulison, informed Ferraro that under the Communications Act, with limited exceptions, radio transmitting apparatus could only be operated "upon issuance of a station license covering such apparatus," and that, even if licensed, could only be operated "by persons holding an operator's license issued by this Commission. . . ." Paulison's letter warned Ferraro that: "Unlicensed operation may subject the operator to serious penalties provided for in the Communications Act, including for a first offense a maximum fine of $10,000 or 1 year imprisonment, or both, and for subsequent offenses a fine of $10,000 or 2 years imprisonment, or both." Paulison concluded his letter by emphasizing the danger to important radio communications posed by unlicensed operations and the need to comply with legal requirements. MM Ex. 1, Attach 1.

10. Weiner was aware of Paulison's letter about the time it was sent to Ferraro. Weiner was also aware in January 1971 that the Commission was concerned and objected to his own unlicensed broadcast operation as a result of a visit he received from an agent of the Commission, Alexander Zimny, who informed Weiner that he was in violation of the Communications Act and that what he was doing was against the law. Tr. 42-43.

11. After Zimny's visit, Weiner and Ferraro ceased their broadcast operations. Weiner and Ferraro traveled to Washington, D.C., and met with then FCC Commissioner Nicholas Johnson to determine whether there was any way that they could operate a small Yonkers community radio station without running afoul of the Commission's rules. They were told by Johnson that there were no frequencies available and that purchasing a station in New York would be difficult. After their meeting with Johnson, Weiner and Ferraro returned home and resumed their unlicensed broadcast activities. Tr. 43-44.

12. In August 1971, Weiner and Ferraro were arrested and charged with five counts of violating Sections 301 and 501 of the Communications Act of 1934, for "operating a radio station in interstate commerce without a license." MM Ex. 1, Attach. 3. Upon their arrest, Weiner and Ferraro ceased their unlicensed broadcast operations. Tr. 47.

13. On September 14, 1971, Weiner and Ferraro each pled guilty to the charges against them. They both received suspended sentences and were placed on probation for one year. MM Ex. 1, Att. 3.

14. In a letter to the Commission dated May 18, 1971 (MM Ex. 1, Att. 2), Weiner gave his reasons for his unlicensed broadcast operation. Weiner set forth the view that his operation of a broadcast station without a license was not illegal because nobody owns the airwaves. Weiner made clear his intention to continue to operate the unauthorized Yonkers station. In this regard, Weiner stated:

> We started this whole thing because we love Radio as an artistic and creative medium, and to bring freedom to the airwaves, not because we want fat bank accounts and chauffeur-driven cars. We have chosen our operating frequencies especially so as not to cause interference with any other stations. However, as human beings, as citizens of the United States, and the World, we have a right to use the airwaves put there by who or whatever created the universe, and use them we will. This is our freedom, this is our right.

Weiner claimed at the hearing that his actions in 1971 were "misguided" (Tr. 46) and stemmed from the youthful rebellious atmosphere in his high school at the time (Tr. 48-50). However, as discussed under the issues, *infra*, Weiner's misconduct as a youth was not an aberration. Rather, Weiner's unauthorized operation in 1971 is emblematic of his later actions as an adult.

Unlicensed Operation of WOZW (AM) (Issue a)

15. In 1980, WBC purchased WELF(FM), Presque Isle, Maine. The transfer application was approved on December 10, 1980. Weiner began operation of the station within a day or two of the transfer application being approved. He changed the call letters to WOZI(FM). MM Ex. 1, p. 2, Admission 11; Tr. 50.

16. In 1981, WBC applied for and obtained the construction permit for a new AM Station at Monticello, Maine. WBC constructed this station which began broadcasting with test authority on November 3, 1981. MM Ex.

1, p. 2, Admission 11; Tr. 52-53. Call letters WOZW(AM) were assigned to the station. Weiner served as the president, general manager and chief engineer of stations WOZI(FM) and WOZW(AM) during the time the licenses were held by WBC. MM Ex. 1, 2, Admission 13. In this connection, Weiner had prior engineering experience. Weiner constructed a 10 watt noncommercial station while attending college in the 1970s and remained there as chief engineer until his departure. Also, Weiner served from 1978 until 1980 as chief engineer of WTMS-FM and WEGP-AM, Presque Isle, Maine. Tr. 51.

17. WOZW(AM) was licensed to operate during daytime hours only, on 710 kHz. However, in January 1982, Weiner began using WOZW(AM)'s antenna facilities for unlicensed nighttime operation on 1616 kHz. MM Ex. 1, p. 3, Admission 22; Tr. 53. Neither Weiner nor WBC have ever held any permit, license, or any other form of authorization from the Commission to operate on 1616 kHz. MM Ex. 1, p. 3, Admission 23. In addition, to broadcasting on 1616 kHz, Weiner simulcast his unlicensed nighttime broadcasts on 6 MHz and 16 MHz. MM Ex. 1, p. 3, Admission 24. Neither Weiner nor WBC have ever held any permit, license or any other form of authorization from the Federal Communications Commission to operate on either 6 MHz or 16 MHz. MM Ex. 1, p. 3, Admission 25.[1]

18. Weiner identified his unlicensed operations on the air by the name "Pirate Radio North" and by the call letters "KPRC." Weiner was the station's announcer and identified himself on the air as "Pirate Joe." "Pirate" is a term used for unlicensed radio operators. According to Weiner, the unlicensed broadcasts began in January 1982, averaging once or twice a month and continued until May 3, 1984 (Tr. 54). Weiner dismantled the KPRC transmitting apparatus and closed the illegal operation down only after Commission personnel discovered his illegal operation. Tr. 54. Commission personnel at the Belfast (Maine) Monitoring Station intercepted Weiner's illegal transmissions on 1616 kHz at the following times and dates:

Date	Time (GMT)
01/31/82	0530-0935
02/08/82	0422-0801
02/20/82	0505-0727
03/09/82	0418-0646
04/01/82	0455-0740
04/15/82	0602-0851
04/29/82	0527-0748
05/15/82	0350-0722
07/02/82	0350-0729
08/07/82	0234-0450
09/03/82	0355-0736
10/15/82	0420-0638
10/28/82	0200-0640
12/16/82	0430-0646
02/16/83	0444-0636
03/25/83	0330-0706
05/15/83	0130-0706
06/02/83	0335-0645
03/18/84	0300-0758
04/15/84	0536-0918[2]

MM Ex. 1, Att. 5, para. 1; Tr. 68-69.

19. Weiner offered no excuse for his unlicensed operation on the 1616 kHz, 6.2 MHz and 16.2 MHz frequencies. He now claims that his activities were stupid and a mistake. He says that at the time he felt it was exciting to put a signal on the air at night on a clear channel and talk to people at great distances. Tr. 64-65.

Refusal To Permit Station Inspection (Issue b)

20. On May 3, 1984, Arthur Hallam, an electronics engineer[3] assigned to the Commission's Belfast Monitoring Station for the past 11 years, using special electronic equipment and direction finding techniques, traced the source of the transmissions on 1616 kHz to the WOZW(AM) transmitting tower. He also determined that the source of the 6.2 MHz and 16.2 MHz signals was antennae located on auxiliary buildings located on the WOZW(AM) grounds. Tr. 141, 143-147.

21. After identifying the source of the signals, Hallam requested assistance from the State Police. On May 3, 1984, at 1:40 a.m., Hallam, accompanied by a State Trooper, returned to the WOZW(AM) grounds. He and the Trooper went to a house on the premises which had lights on and knocked repeatedly on the door of the house. Through a window in the door Hallam saw studio equipment. Coming from inside the house he could hear the KPRC audio he had been monitoring on 1616 kHz. After receiving no response to the knocks, the State Trooper went to his cruiser, turned on his blue flashing lights and blew his horn. At this point, Hallam heard a shuffling noise from the second story of the house followed by the sound of someone coming downstairs. Through the window in the door Hallam saw Weiner moving about inside the house. Hallam banged on the door again, but Weiner ignored him. Because Hallam did not have a search warrant, he and the State Trooper left the property. The illegal transmissions ceased at 1:57 a.m. Tr. 147-148.

22. Weiner admits he was aware of Hallam's early morning visit. He also admits hearing Trooper Heiyer calling his name and asking him to open the door. Weiner also admits that he had no doubt that Hallam wanted to inspect his transmitter site. Tr. 170. Nevertheless, Weiner ignored Hallam's and Heiyer's requests to open the door. Tr. 169. Weiner initially stated he was "scared" to open the door because of the lateness of the hour. Tr. 169. Weiner, however, did not ask Hallam or Heiyer to produce their identification. Weiner subsequently admitted that the real reason he was "scared" to open the door was because he knew he was doing something illegal. Tr. 169.

23. On May 3, 1984, at around 10:45 a.m., Hallam went to the studios of WOZI(FM) and WOZW(AM) in Presque Isle, Maine and met with Weiner. Hallam told Weiner that he had traced the source of the 1616 kHz, 6 MHz and 16 MHz signals to the grounds of the AM transmitter in Monticello and that he had no doubt as to the source of the signals. Weiner denied any knowledge of the broadcasts, which Weiner admits was false. Tr. 59-60. Weiner told Hallam that he would look into the matter and if anything was going on he would put a stop to it. Tr. 149-150. Hallam did not on that occasion ask to inspect the facilities of WOZW-AM. Tr. 150.

24. After speaking with Weiner, Hallam left the WOZI(FM)/WOZW(AM) studios. He returned an hour later and asked Weiner several times if he would inspect the transmitting facilities of WOZW-AM. By facilities, Hallam meant the transmitter building at the base of the tower, and the building which looked like a former residence and housed the studio-to-transmitter link. Weiner asked Hallam if the KPRC operation was illegal and Hallam told him "of course it is." Weiner told Hallam that he would not allow the inspection because he had the station to protect. Tr. 150-152; MM Ex. 5, Att. 5, p. 3.

25. Weiner admits that Hallam made clear to him in his late morning visit his concern about the AM operation and the signals picked up the night before. Tr. 173. Weiner, however, attempts to excuse his failure to permit inspection on the ground that Hallam did not ask to inspect the WOZW(AM) facility "in any official way" (Tr. 168). According to Weiner, Hallam "very loosely requested that the both of us go down and take, you know, walk around my house, and I do recall him using the word, and -- and see what we can find out and -- and see what's down there" . . . . Tr. 168. Weiner states that he was waiting for Hallam to request an inspection of the WOZN transmitter site and "found it very unusual that he did not request an official inspection of the station." Tr. 168. Weiner further asserts that if Hallam had requested an "official inspection" of WOZW-AM, he would have allowed him to inspect the station. Tr. 168. However, according to Weiner, Hallam "asked to inspect his private residence" and without time to speak to his attorney, he denied that request. Tr. 168, 170-171.

26. Hallam denies asking Weiner to visit his private residence, pointing out that he had no purpose, need or desire to do so. Hallam also denies asking Weiner to take a walk around the house and see if we can find out who is responsible for the broadcast. Tr. 159. Hallam does not remember his precise words to Weiner but his intent was to look at WOZW-AM's transmitting facilities to inspect the equipment there. Tr. 161. The buildings he was interested in were the building that housed the station's technical facilities and the building at the base of the AM transmitter. Tr. 158-159. Hallam remembers very clearly indicating to Weiner that he "wanted to see the transmitting facilities of WOZW and that Weiner wouldn't permit the inspection." Tr. 151-152, 158-161. Hallam's normal procedure is to request to see the technical facilities and he is sure he followed that procedure when speaking to Weiner on May 3, 1984. Tr. 160.

27. Following Weiner's refusal to allow inspection, Hallam revisited the WOZW-AM facilities. In the daytime, Hallam was able to observe a four element rotary beam at the back end of a building that Hallam stated looked about the right size for a 16 megacycle antenna. Also, Hallam noticed a murch guide pole antenna, which Hallam described as able to radiate a 6 megacycle signal, running from the back of the building to a tree or other object. Tr. 152. Hallam looked in the windows of the building, located about a thousand feet from the AM antenna, and saw a transmitter and studio equipment including equipment for program origination. Hallam was unable to see into the windows of the building located at the base of the AM tower. Tr. 152. At the time of his visit, Hallam was not aware that the building containing the studio equipment also served as Weiner's residence. To Hallam, looking through the window, it looked like a building used to house equipment auxiliary to the broadcast transmitting facility, including the studio to transmitter link and other things. Tr. 163-164. Hallam saw nothing indicating that it was a residence. Tr. 164.

Main Studio Location (Issue c)

28. When Hallam visited Weiner on May 3, 1984, he noted that the main studio for WOZW(AM) was co-located with the WOZI(FM) main studio in Presque Isle, Maine. The location of the WOZW(AM) main studio in Presque Isle instead of the community of license or the transmitter site (both in Monticello, Maine), violated Section 73.1125 of the Commission's Rules. MM Ex. 1, Att. 5.

29. Weiner asserts he maintained a small studio at the transmitter site in order to do local programming and remote tie-ins. According to Weiner, in 1982, he had been informed by the NAB that he could co-locate his studios in Presque Isle so long as he maintained a studio at his transmitter site. Weiner states he was not aware of any violation regarding his rebroadcasting of local programming. WBC Ex. 1, para. 3.

Unauthorized Operation Of Remote Pickup Base Station KPF-941 (Issue d)

30. On April 15, 1984, Weiner on behalf of WBC, applied to the Federal Communications Commission for a license to operate a Remote Pickup Base Station at Yonkers, New York. WBC's application (BPLRE-840215MD) was granted on August 13, 1984, and call sign KPF-941 was assigned. Station KPF-941 was authorized under Section 74.402(a) of the Commission's Rules to operate on 1622 kHz. MM Ex. 1, p. 2, Admission 14. KPF-941 was licensed to be operated in association with WOZI(FM), Presque Isle, Maine.

31. Weiner misrepresented the intended use of the remote pickup base station. Weiner's intent in applying for KPF-941 was to provide a broadcast origination service to his home community of Yonkers, New York. Weiner was aware that there were no frequencies available in the New York market by which he could legitimately achieve that goal and used the subterfuge of his ownership of a licensed Maine station to accomplish that purpose. Tr. 77. Weiner did not disclose in his application form that he intended to use KPF-941 as a broadcast station. As a Commission licensee at the time, Weiner was well aware of the difference between filing an application for a new broadcast station on FCC Form 301 and filing an application for an auxiliary station that was to be used in conjunction with another broadcast station. Tr. 70-71.

32. Weiner admits that in filing his application, he was hoping to exploit what he believed was a "loophole" in the Commission's Rules. Tr. 77. However, he claims it was not his intention to circumvent the Commission's Rules. Tr. 76-77. Weiner asserts as a defense for his misconduct, that he didn't read anything in Part 74 which precluded operation for broadcasting directly to the public. Tr. 73-74. However, Weiner was unable to cite the provisions in Part 74 on which he allegedly relied for this conclusion. Tr. 73-75. Weiner's claim that he was confused about the provisions of Part 74 is not credible and represents an attempt by Weiner to "stonewall" his misconduct. Weiner did not disclose the true purpose for the application because, as he was forced to admit, he knew that if he had done so, the application would not have been granted. Tr. 75-76.

33. During the week of November 12, 1984, the Commission's New York City office received information from the Belfast, Maine, Monitoring Station that a station was broadcasting in the vicinity of Yonkers, New York, under the call sign KPF-941 on a frequency of 1622 kHz. On November 20, 1984, a Commission engineer in the Commission's New York City office monitored the station between 8:05 p.m. and 8:20 p.m. The station was playing music during this period. MM Ex. 1, p. 5, para. 7. The station was also monitored on other occasions in November 1984, and determined to be broadcasting directly to the public. MM Ex. 1, Att. 5, para. 8.

34. By telegram, dated November 29, 1984, the Chief, Mass Media Bureau, directed WBC "to cease immediately use of KPF-941 as a broadcasting station and for any other purpose which does not comport with Section 74.431." On November 30, 1984, Ferraro, Weiner's partner in KPF-941, was issued a Warning (FCC Form 835) that operation of a broadcast station on 1622 kHz constituted an unlicensed operation in violation of Section 301 of the Communications Act of 1934, as amended. MM Ex. 1, Att. 5, para. 9.

35. Upon receiving the November 29, 1984, telegram, Weiner and Ferraro ceased operation of KPF-941. Weiner then sought legal advice from a communications attorney, Michael Couzens. In a letter to Weiner dated January 29, 1985, Couzens advised Weiner "that it is incorrect for anyone to conclude that FCC rules permit the use of auxiliary broadcast facilities for transmissions *intended for use by the general public*." (emphasis in the original). Couzens also warned Weiner that what he was doing with KPF-941 "could be an issue in the primary station's license renewal." Tr. 79; 82; MM Ex. 3, p. 2.

36. By letter dated February 20, 1985, Weiner informed the Chief, Mass Media Bureau, that, in light of the advice he had received from his legal counsel, KPF-941 "has adopted a written policy limiting use of KPF-941 to 'material that is actually or potentially intended for broadcast over WOZI/WOZW.'" The letter concluded that WBC intended to reactivate KPF-941 on March 4, 1985. MM Ex. 1, Att. 4.

37. On March 4, 1985, KPF-941 went back on the air with programming intended for the general public. To give color to his claim of compliance with the Commission's Rules, Weiner had an employee at his Maine stations monitor the 1616 kHz signal of KPF-941 in Yonkers. In addition, he had the KPF-941 broadcasts mention the primary station's call sign. Tr. 82-83. Weiner, however, never intended to use the KPF-941 signal at his Maine stations. Rather, he intended by this subterfuge to legitimize his attempt to provide Yonkers with its first broadcast station. Tr. 84. Weiner characterized his illegal conduct as "another grave mistake on my part." Tr. 84; WBC Ex. 1, p. 1.

38. By *Order to Show Cause and Notice of Apparent Liability*, 50 Fed. Reg. 20603, published May 17, 1985, the Commission ordered Weiner to show cause why the licenses for Radio Stations WOZW(AM), WOZI(FM) and Remote Pickup Base Station KPF-941, should not be revoked for alleged unauthorized or unlicensed operation. By *Memorandum Opinion and Order*, MM 4010, released April 24, 1986, the Chief, Mass Media Bureau, approved the transfer of WOZW and WOZI pursuant to the Commission's Minority Distress Sale Policy and terminated the revocation proceeding subject to the condition that the license authorization for KPF-941 be surrendered within 90 days. MM Ex. 1, Att. 6.

39. On January 28, 1988, Weiner filed a request with the Commission seeking reinstatement of Remote Pickup Base Station KPF-941 to WBC. Weiner's filing included a request that KPF-941 be permitted to originate programs from its Yonkers, New York, location. Weiner requested a waiver of "whatever rules apply." By letter dated March 31, 1988, the Chief, Audio Services Division, noting that remote pickup stations are not intended for direct reception by members of the public, denied Weiner's request. MM Ex. 15.

Misrepresentations as to KPF-941 Equipment Type Acceptance (Issue e)

40. In his application for base station KPF-941, Weiner falsely represented that the transmitter would be type accepted for the purposes for which remote pickup base stations are intended; commercial broadcast operation is not one of the permitted uses. On November 28, 1984, members of the Commission's New York office conducted an inspection of Remote Pickup Base Station KPF-941. The inspection disclosed, however, that the transmitter in use for Station KPF-941 was a "Western Electric 451 AI" which did not have type acceptance for operation under Part 74 (auxiliary broadcast rules) of the Commission's Rules. The transmitter was, instead, type accepted for commercial broadcast operation under Section 73.1660 and part 2 of the Commission's Rules.

41. Weiner claims that the use of the Western Electric transmitter was an error. He claims that he had assumed that a type accepted broadcast transmitter under Part 73 of the Commission's Rules would be type accepted under Part 74. WBC Ex. 1, para. 5. Weiner's claim is not believable in light of his experience as an engineer (see findings 16, *supra)*, as well as licensee of broadcast stations. Weiner's lack of candor regarding his use of broadcast equipment is another example of his unwillingness to be fully forthcoming concerning his many and varied illegal activities.

Offshore Unlicensed Broadcasts (Issue f)

42. On January 24, 1986, Weiner entered into a purchase agreement for a refrigerated fishing vessel of Panamanian registry known as the Litchfield 1. MM Ex. 7. The ship was transferred to Weiner in May 1988. Weiner renamed her the Sarah and had her registered as a Honduran vessel. MM Ex. 1, p. 4, Admission 34; Tr. 90-91.

43. Weiner's purpose in purchasing the vessel was to outfit her as a broadcast station. Tr. 88. To this end, he equipped the Sarah with the equipment necessary to broadcast on 1620 kHz (AM Radio), 103.1 Mhz (FM radio), 6240 kHz (Shortwave radio) and 190 kHz (low frequency band). MM Ex. 1, p. 4, Admission 35. Money for the equipment came from Weiner's personal savings. Tr. 92.

44. On July 21, 1987, Weiner had the Sarah towed from the Port of Boston to a point approximately 4.5 miles off Long Beach, New York, on Long Island Sound (off the coast of Long Island, New York). Tr. 92-93; MM Ex. 1, p. 4, Admission 36.

45. On July 23, 24, 26 and 27, 1987, from 6:00 p.m. to midnight, Weiner caused transmissions to emanate from the Sarah on 1620 kHz with 1,000 watts of power, on 103.1 MHz with 1,000 watts of power, on 6,240 kHz with 300 watts of power and on 190 kHz with 75 watts of power. The radio emissions from the Sarah were identified as being broadcast by "Radio New York International" (RNI).[4] On July 23, 24, 26 and 27, 1987, neither Weiner, nor WBC, nor RNI, nor any person or entity associated with the broadcasts, held any license, permit or any other authorization to operate a radio station on 1620 kHz, 103.1 MHz, 6,240 kHz or 190 kHz. MM Ex. 1, p. 4, Admissions 37, 38 and 39.

46. On July 25, 1987, the United States Coast Guard was granted permission to board the Sarah. Accompanying the Coast Guard was Alexander Zimny, an engineer from the Commission's New York City office. Zimny orally informed Weiner that the broadcasts from aboard the Sarah were in violation of the Commission's Rules. When Zimny attempted to issue Weiner a written warning to that effect, Weiner refused to accept it. A copy of the warning (FCC Form 835) was left with Weiner aboard the Sarah. MM Ex. 1, p. 4, Admission 40. That warning stated that, "At the time of the inspection, a valid radio license was not in evidence for inspection. Operation of the station without proper Commission authorization is a violation of Section 301 of the Communications Act of 1934, as amended." MM Ex. 11. Weiner claims he ignored the warning at the time because the Sarah was not in United States water and, therefore, he believed that his broadcast operation was not in violation of the Communications Act. Tr. 117-118. Weiner did not seek legal counsel in making this determination. Tr. 118.

47. On July 28, 1987, at 5:30 a.m., the Coast Guard cutter "Cape Horn" arrived at the Sarah and Weiner and another individual, Ivan Rothstein, who were aboard the ship at the time, were arrested and taken into custody. MM Ex. 1, p. 4, Admission 4. Weiner was charged with illegally operating a broadcast station on board a ship off the coast of Long Island in violation of federal and international law. MM Ex. 12. If convicted of the charges Weiner faced a maximum jail term of five years and/or a $250,000 fine.

48. On August 8, 1987, the Sarah was towed from Long Island Sound to a berth in the Port of Boston. MM Ex. 1, p. 5, Admission 43.

49. On August 27, 1987, Andrew J. Malone, United States Attorney for the Eastern District of New York, and Richard M. Smith, Chief of the Commission's Field Operations Bureau, announced the Government's decision to defer criminal prosecution of Weiner and Rothstein for their involvement in the broadcasts from aboard the Sarah. MM Ex. 1, p. 5, Admission 43. In a Press Release issued that date, they stated that by shutting down the illegal station the Commission had "achieved what it set out to accomplish -- it affirmed that the FCC's authority to regulate the airwaves extends to offshore broadcasts." The Press Release also stated that "the decision to defer criminal charges was based in part on Weiner's and Rothstein's adherence to their agreement, made before Magistrate John L. Caden on July 28th, not to resume broadcasts." It concluded that the defendants and their colleagues "are now on notice that offshore broadcasts are illegal." Should the broadcasts resume, the Press Release concluded, "the violators will be prosecuted to the full extent of the law." MM Ex. 12.

50. Once the Sarah was back in the Port of Boston, Weiner began repairs on the ship's transmitting equipment and generator room (which had been flooded) with the intent of using the vessel again to transmit radio signals. MM Ex. 1, p. 5, Admission 45. In an article written by Weiner, and published in the April 1988 issue of *Popular Communications*, Weiner stated that the Sarah had been "literally pirated at sea by my government." He also stated his intention to bring the Sarah out again to resume broadcasting "as soon as the warm weather arrives." MM Ex. 17. In June 1988, Weiner attempted to have the Sarah towed from the Port of Boston to Long Island Sound for the purpose of resuming broadcasting, but the ship was not allowed to leave because it was not in compliance with port regulations. Weiner temporarily registered the Sarah in the State of Maine to meet port regulations which were less stringent on domestic vessels than on foreign registry vessels. MM Ex. 1, p. 5; Admissions 46 and 47; Tr. 99; MM Ex. 18.

51. After registering the Sarah with the State of Maine, Weiner had the vessel towed to the same place four and one-half miles off Long Beach that it had been anchored in July 1987. MM Ex. 1, p. 5, Admission 48. Upon arriving at anchor on September 9, 1988, Weiner had the Sarah reregistered with the "Principality of Sealand." Tr. 100; MM Ex. 1, p. 5, Admission 48. The "Principality of Sealand" is a small former British gunnery platform located off the coast of England. Tr. 112. Built in the early part of 1942, its purpose was to defend the Thames Estuary against German attacks on shipping lanes. In 1967, a group directed by Roy Bates, a United Kingdom citizen, established themselves on the fort to run an illegal radio station. Subsequently, Bates declared the fort to be a sovereign principality with himself and his wife as titular heads. MM Ex. 19. Sealand agreed to register the Sarah in exchange for free advertising time. Tr. 112-113.

52. The United Kingdom does not recognize Sealand as a sovereign nation and has never abandoned title to the fort. The Territorial Sea Act of 1987, extended the United Kingdom's territorial jurisdiction to encompass the fort. The United Kingdom does not recognize the right of Sealand to register ships. MM Ex. 19. The United States also does not recognize Sealand registry of vessels. MM Ex. 20. Prior to registering the Sarah with Sealand, Weiner made no investigation to determine whether the United States recognized Sealand's registry of vessels. Tr. 115.

53. On August 4, 1988, the United States Attorney instituted an action to obtain a temporary restraining order (TRO) to prevent Weiner from broadcasting aboard the Sarah. MM Ex. 1, Att. 12, p. 2.

54. By letter dated August 29, 1988, to Weiner, the United States Attorney set forth the terms of an agreement whereby the United States Attorney agreed not to take steps to have a TRO entered against Weiner as long as Weiner agreed not to "broadcast from on board the *Sarah*, or any other vessel, either within or without the national territorial waters, pending a decision by the United States District Court on Plaintiff's Motion for Preliminary Injunction." Weiner agreed that he would "not broadcast from the *Sarah* under any circumstances until [his] alleged right to broadcast is decided by the Court." Weiner also agreed, "as a matter of fairness" to use his "best efforts to see that no other persons -- be they defendants in this action or not -- broadcast from the *Sarah* until permitted to do so by the Court." Weiner

signified his consent to the terms of the agreement by signing the letter setting forth the agreement on August 30, 1988, and returning it to the office of the United States Attorney. MM Ex. 1, p. 6, Admissions 55, 56, 57 and Att. 8; Tr. 100.

55. Weiner had no intention of abiding by his agreement with the United States Attorney. On October 4, 1988, Weiner transferred the Sarah to Atlantic Radio Communications, Limited, an English company. MM Ex. 1, Att. 10. In actuality, the transfer was a sham. The English corporation was set up by Weiner and his associates. The transfer was to a friend of Weiner's who had agreed to take title to the Sarah on a temporary basis. Despite the transfer, Weiner still had control of the Sarah. It was understood at the time of the transfer that Weiner could have title to the Sarah back at any time he wanted it. The purpose of the transfer was to evade the agreement that Weiner had entered into with the United States Attorney. Tr. 101-104; 110.

56. On October 14, 15 and 16, 1988, while the Sarah was anchored on Long Island Sound, Weiner caused broadcasts to emanate from the Sarah on 1620 kHz, with a power of 1,000 watts. As in July 1987, the broadcasts were identified as by RNI. Also, as in July 1987, the broadcasts were unauthorized by the FCC. MM Ex. 1, p. 5, Admissions 50, 51 and 52.

57. Although Weiner was not personally on board the Sarah at the time of the October 1988 broadcasts, on board were two crew members who were friends of Weiner. They had been selected and recruited by Weiner and took their instructions from him. Tr. 110-111. Weiner admitted that it was he who was responsible for putting the station back on the air and that it was he who directed that the station begin broadcasting in October 1988. Tr. 102-103.

58. Weiner claimed that he did not believe that he had violated his agreement with the United States Attorney because he construed his agreement as only precluding him from personally broadcasting from aboard the Sarah. For this reason he remained off the Sarah and had his friend in Britain hold title to the ship. Tr. 109. When confronted with the fact that the agreement also called for Weiner to use his best efforts to see that no other person broadcast from the Sarah, Weiner responded: "Yeah, the second part, I guess I really didn't read that letter too carefully." Tr. 109. Weiner, also was unable to distinguish between personally broadcasting from aboard the Sarah and having his friends do so at his direction. Tr. 112. Weiner admitted that his agreement to discontinue unlicensed broadcasts was "disingenuous" in light of his subsequent actions. Tr. 111-112. Weiner made clear that his motive for entering into the agreement with the United States Attorney, which he did not intend to honor, was to get the ship out of port. Tr. 111-112.

59. On October 17, 1988, United States District Judge, John J. McNaught, signed an order temporarily restraining the operation of a radio station from onboard the Sarah. MM Ex. 1, Att. 13. Judge McNaught's order was served by the Coast Guard on the Captain of the Sarah. After receiving the order, broadcasts from aboard the Sarah ceased and the ship was returned to Boston harbor. Tr. 107-108; 119-120.

60. On October 22, 1988, Weiner personally "repossessed" the Sarah. Radio New York International, Inc. has been abandoned as worthless "without any assets whatsoever." MM Ex. 1, Atts. 14 and 16; MM Ex. 21 and Tr. 121.

Weiner's Rehabilitation Claim

61. Weiner concedes, as the findings in this proceeding amply make clear, that he has made many mistakes in the past and that he was wrong to violate the Commission's Rules. He pledges that if he is granted a license in this proceeding, he will abide by all Commission rules and regulations. Weiner who is now employed by ABC Television, believes that he has rehabilitated himself and now possesses the necessary character to again become a public trustee. WBC Ex. 1, para. 7.

62. In support of WBC's application, Weiner submits a statement from William C. Miller, Manager, TOC Maintenance for ABC Broadcast Operations & Engineering. Miller states that Weiner was first hired by ABC on May 14, 1988, as a temporary employee and then, after being let go by ABC was again rehired as a temporary employee on April 1, 1989. On April 28, 1989, Weiner was made a regular employee of ABC. According to Miller, who has been Weiner's supervisor during the entire course of Weiner's employment at ABC, Weiner is a "stable, reliable worker and is quite gifted technically." Weiner also submits a statement from Thomas S. Kneitel, Editor of *Popular Communications*, which publishes dates and times when pirate radio stations throughout the world can be picked up and received. Tr. 136. Weiner is a subscriber to the magazine. Tr. 126. Kneitel states that he has known Weiner professionally and personally for several years and that he has found Weiner "to be a thoroughly responsible and upstanding member of the community, and a person of excellent character." Kneitel believes that "Weiner would be a credit to the broadcasting community and to the Federal Communications Commission." WBC Exs. 2 and 3.[5]

CONCLUSIONS

63. Weiner Broadcasting Company (WBC), which is 100% owned and controlled by Allen Weiner, seeks authority to operate an international broadcast station. The evidence adduced in this proceeding requires the conclusion that WBC and Weiner do not possess the requisite character qualifications to be a licensee. The application will be denied.

64. In a May 18, 1971 letter to the Commission, Weiner expounded the view that he had an inalienable right to use the airways in any way he saw fit with or without government approval. The record in this proceeding unmistakingly makes plain that that credo has governed Weiner's conduct in his dealings with the Commission. Further, the record reveals that Weiner has engaged in deception and falsehoods and has repeatedly and willfully violated Commission Rules and the Communications Act when they stand in the way of his immediate goal. Additionally, Weiner's testimony in this proceeding in defending and excusing his action has been in a number of instances, evasive, non-responsive and lacking any credibility.

65. Weiner's record of disobedience of the Communication's Act and the Commission's Rules began at the age of 17 when he and a friend J. P. Ferraro, decided that their

local community of Yonkers needed their services as broadcasters. After determining that they could not legally put a radio station on the air, they did so any way. Calling their operation the "Falling Star Network" the pair operated two unlicensed radio stations on alternate days of the week on 87.9 MHz and 1620 kHz from Yonkers. Weiner and Ferraro were warned by letter from the Commission, in January 1971, that their unlicensed operations could subject them to a fine or time in prison. In addition, in January 1971, Weiner and Ferraro were visited by a Commission employee who reiterated the warning. Despite a letter and a personal visit by a Commission employee, Weiner and Ferraro continued their unauthorized broadcasts until their arrest in August of 1971 for violations of the Communications Act.

66. In defense of this behavior, Weiner claims that he was swept up in the rebellious mood of the early 1970's. While Weiner attributed his early violations to the mood of the times, his subsequent behavior, discussed under the issues, *infra*, reveals that his behavior as a youth is indicative of an attitude of disregard for the law that has extended into adulthood.

Unlicensed Operation Of WOZW (AM) (Issue a)

67. In 1980, WBC became a Commission licensee of an FM station in Presque Isle, Maine. In 1981, WBC applied for and received the construction permit for a daytime only AM station on 710 KHz at Monticello, Maine. The AM Station, WOZW(AM), went on the air with test authority in November 1981. Neither Weiner nor WBC have ever held any permit, license, or any other form of authorization from the Commission to operate on either 6 MHz or 16 MHz. Nothwithstanding, within 3 months of WOZW(AM) receiving program test authority, Weiner began using WOZW(AM)'s antenna facilities for unlicensed nighttime operation on 1616 khz. In addition to broadcasting on 1616 kHz, Weiner simulcast his unlicensed nighttime broadcasts on 6 MHz and 16 MHz. Weiner offered no excuse for his misuse of the WOZW(AM) facility other than he found it exciting to talk to people at great distances. Standing alone, Weiner's blatant contempt for the Commission and its Rules by willfully and repeatedly operating illegally as "Pirate Joe" over a two and a half year period of time is sufficient to disqualify him for consideration as a licensee.

Refusal To Permit Station Inspection (Issue b)

68. Section 73.1225 of the Rules requires that the "licensee of a broadcast station shall make the station available for inspection by representatives of the FCC during the station's business hours or at any time it is in operation." The record establishes that Weiner on two occasions on May 3, 1984 willfully refused to allow inspection by FCC employees, in violation of the Rules. First, in the early morning of May 3, 1984 (1:40 a.m.), Arthur Hallam, an electronics engineer assigned to the Commission's Belfast Monitoring Station, accompanied by a State Trooper, sought unsuccessfully to inspect Weiner's AM facilities. Weiner, who was transmitting illegally at the time, heard the knocking at the door and had no doubt that Hallam wanted to inspect the AM transmitter site. However, in clear violation of his obligation to permit inspection when the station is in operation, Weiner ignored the repeated requests to open the door. Weiner initially attempted to excuse his misconduct by asserting that he was "scared" to open the door because of the lateness of the hour. Weiner's response was lacking in candor since, as brought out in further questioning, the real reason for not opening the door was because Weiner knew he was doing something illegal.

69. Weiner also willfully violated Section 73.1225 of the Rules later on the same day when he refused Hallam's request to inspect the AM facilities. Weiner's claim that he did not permit inspection because Hallam did not ask to inspect the facility "in any official way" and that Hallam wanted to inspect Weiner's private residence is patent nonsense and unworthy of belief. The record establishes that Hallam made clear his intent to inspect the AM facilities transmitting the illegal signals, that Weiner was fully aware of Hallam's intentions, and that Weiner refused inspection, as in the case of the early morning refusal, because he knew he was doing something illegal. Weiner's unwillingness to be forthcoming even at this late date coupled with his willful violation of Rule 73.1125 provides further reason for denying the instant application.

Main Studio Location (Issue c)

70. Section 73.1125 of the Rules, as it existed in 1984, required an AM station to maintain its main studio in its principal community of license or at the station's transmitter.[6] WBC was in violation of the Rule since the main studio for WOZW(AM) was co-located in Presque Isle, Maine with the studios of WOZW(FM). Weiner seeks to excuse this violation on the ground that he was informed by an unidentified NAB representative that the co-location was permissible as long as he maintained a studio at his AM site. The small studio maintained at his AM transmitter site, as described by Weiner, does not satisfy the Commission's requirements. A main studio "must, at a minimum, maintain full-time management and full-time staff personnel", which was not the case here. *Jones Eastern Of The Outer Banks, Inc.*, FCC 91-175, released June 19, 1991, paragraph 9. Moreover, Weiner, as a licensee, was responsible for complying with the Commission's Rules. His attempt to foist blame on an unnamed NAB representative does not excuse or mitigate his failure to maintain a main studio in accordance with the Commission's requirements.

Unauthorized Operation Of Remote Pickup Base Station KPF-941 (Issue d)

71. In April 1984, Weiner, on behalf of WBC, applied for a license to operate a Remote Pickup Base Station at Yonkers, New York. The application was granted and call sign KPF-941 was assigned. KPF-941 was licensed to be operated in association with WOZI(FM), Presque Isle, Maine. Station KPF-941 was authorized under Section 74.402(a) of the Rules to operate on 1622 kHz, Section 74.431-74.432 of the Rules sets forth the permitted uses for remote pickup stations. Using the station to broadcast directly to the public is not a permissible use. In applying for the remote pickup base station, Weiner intentionally misrepresented its intended use. Weiner knew there were no frequencies available to fulfill his youthful dream of operating a Yonkers radio station. *See* Conclusion 65, *supra*. Weiner used the subterfuge of his ownership of a licensed Maine station to accomplish that purpose. Weiner never intended to use this auxiliary station for the purpose represented in the application. Rather, his intent was to use the station to broadcast directly to the public, a use not authorized by Part 74 of the Rules. Weiner's

assertion that it was not his intention to circumvent the Commission's Rules and that he was confused about the Rule's provisions is not credible and is a further instance of Weiner's unwillingness to be forthcoming concerning the full scope of his misconduct. The record makes plain that Weiner did not disclose the true purpose for the application because, as he was forced to admit, he knew that if he had done so, the application would not have been granted.

72. Weiner's later conduct even after having been informed of his wrongful use of the remote pickup station provides further evidence of his total contempt for the Commission's processes. In November 1984, the Commission's Belfast and New York City offices monitored broadcasts by KPF-914, on 1622 kHz. The broadcasts were directed to the general public of Yonkers. By telegram dated November 29, 1984, Weiner was ordered by the Chief, Mass Media Bureau, to cease his improper operation of KPF-941. After receiving the telegram, Weiner ceased operation of the auxiliary station and sought legal advice. Weiner was told by the legal counsel he consulted that it was "incorrect for anyone to conclude that FCC rules permit the use of auxiliary broadcast facilities for transmissions *intended for use by the general public*." (emphasis in the original). Despite the Commission's telegram and his counsel's advice, Weiner, on March 4, 1985, resumed his use of KPF-941 to broadcast to the general public. This time, however, he had someone at his Maine stations tuned to the KPF-941 signal and had KPF-941's broadcasts mention WOZI, the primary station's call sign. Thus, rather than comply with the Commission's rules, he sought to evade them by a subterfuge.

73. Weiner's behavior with regard to his operation of KPF-941 illustrates not only a total disregard for the Commission's rules, but a willingness to deceive in dealing with the Commission. Weiner could offer no excuse for his misuse of KPF-941, chalking it up to another "grave mistake" on his part. Again, Weiner's behavior does not evidence the traits of truthfulness and reliability which the Commission requires of its licensees and provides a further basis for denying the subject application.

Misrepresentations As To KPF-941 Equipment Type Acceptance (Issue e)

74. Consistent with his unlawful intent of using KPF-941 to broadcast directly to the public, Weiner falsely represented in his application that the transmitter would comply with Part 74 type acceptance criteria. Subsequent inspection, however, disclosed that the transmitter in use did not have type acceptance for operation under Part 74 (auxiliary broadcast rules). The transmitter was, instead, type accepted for commercial broadcast operation. Weiner's claim that the use of the transmitter was an innocent error is not believable and provides another example of his unwillingness to be fully forthcoming concerning his many and varied illegal activities.

Offshore Unlicensed Broadcasts (Issue f)

75. Weiner's "grave mistakes" did not end with his illegal operation of a remote pickup base station. The record also establishes that Weiner without a license illegally operated a broadcast station aboard a vessel in international waters, the transmissions of which were received, in violation of international law and the Commission's Rules.[7]

76. In 1986, Weiner purchased a sea going vessel, the Sarah, for purposes of equipping her with broadcast equipment. In July 1987, Weiner, even though he held no authorization from the Commission, had the Sarah towed to Long Island Sound and, from an anchorage in international waters, began broadcasting. Even, *assuming, arguendo*, Weiner believed he had a legal right to broadcast from international waters when the broadcasts were initiated, there is no excuse for his continuing to broadcast after being warned by a Commission engineer that operation of the station without proper Commission authorization was a violation of Section 301 of the Communications Act of 1934, as amended. Weiner simply chose to ignore the warning without bothering to even consult legal counsel for advice. It took action by the United States Coast Guard to terminate the broadcasts. Weiner, for the second time in his life, faced criminal charges based on illegal operation of a broadcast station. Charges against Weiner were deferred by the United States Attorney because of the belief that the FCC, by its actions, had established its authority over offshore broadcasts and Weiner's agreement not to resume broadcasts.

77. Despite his arrest and agreement not to resume broadcasting, once the Sarah was back in port, Weiner began preparing her for the resumption of broadcasting. In an article which appeared in the April 1988 issue of *Popular Communications*, Weiner accused the Commission of pirating his ship and announced his intent to resume broadcasts from aboard the Sarah once the warm weather arrived. In September 1988, Weiner again had the Sarah towed to anchor on Long Island Sound. To make it more difficult for the Coast Guard to board the Sarah, Weiner had the ship's registry changed from the State of Maine to the "Principality of Sealand." The registry of ships by Sealand, a small gunnery platform of the coast of England, is not recognized by the United States government.

78. On August 29, 1988, Weiner and the United States Attorney reached an agreement whereby the United States Attorney agreed not to take steps to enforce a Temporary Restraining Order (TRO) in exchange for Weiner's promise not to broadcast from aboard the Sarah until his alleged right to broadcast is decided by the court. By signing the agreement, Weiner also promised to use his best efforts to see that no other persons broadcast from aboard the Sarah until permitted to do so by the court. However, immediately after signing the agreement, Weiner acted contrary to its intent. He made a sham transfer of the Sarah to a friend of his in England and then selected and recruited a crew and arranged for the resumption of broadcasts. On October 14, 1988, Weiner broke his promise and ordered the resumption of unauthorized broadcasts from aboard the Sarah. Broadcasts were only terminated on October 17, 1988, when a copy of a restraining order signed by a United States District Judge was served on the crew by the Coast Guard. In violating his agreement with the United States Attorney, Weiner again demonstrated that he can not be relied on to keep his word. Weiner claims that he did not intentionally violate his agreement with the United States Attorney because he believed it only precluded him personally from broadcasting aboard the Sarah, and he had not gone on board. This claim, however, is contrary to the unambiguous language of the agreement and, at best, no more than an after the fact rationalization for action that can only be described as deceitful. Weiner's failure to abide by his agreement and his resumption of illegal

broadcasts from aboard the Sarah, raises further serious doubts as to his willingness to abide by the Commission's Rules and Regulations in the future.[8]

79. Under the Communications Act of 1934, as amended, the Commission, before issuing a broadcast license, must first determine that the grant would serve the public interest. *See* 47 USC Section 309. In making that determination the Commission must be confident that the licensee will be law abiding in the operation of the station. *White Mountain Broadcasting Co. v. FCC*, 598 F.2d 274, 277 n. 8 (D.C. Cir.) cert. denied, 444 U.S. 963 1979; *United Broadcasting Co., Inc.*, 49 RR 2d 597, 601 (1981). This obligation stems from the fact that a broadcast licensee is a public trustee, entrusted with the use of a precious resource, and should accordingly maintain a high standard of conduct. *United Broadcasting, supra*, and cases cited therein.

80. The record in this proceeding compels the conclusion that Weiner is not fit to be a licensee and that a grant of his application would not serve the public interest. Weiner's claim that he is now reformed is rejected as unreliable and self-serving. In any case, such a claim is insufficient to overcome his willful disregard for the Commission's processes and his misrepresentations and lack of candor in dealing with the Commission and its representatives.[9] WBC's application is, therefore, denied.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[10] the application of Weiner Broadcasting Company for a construction permit for a new International Broadcast Station at Monticello, Maine IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Weiner also admits operating a shortwave radio illegally in 1984. Tr. 64-66.

[2] The Belfast Monitoring station did intercept a radio communication on 1616 kHz using the call letters KPRC on July 16, 1984. MM Ex. 1, Att. 5, para. 3. Weiner, however, denies that he was responsible for his broadcast. Tr. 67. It is a common practice for pirate radio stations to rebroadcast one another's programs. Tr. 67-68. FCC monitoring stations were unable to get a good fix on the source of the signal nor were they able to determine definitively whether the signal was being simulcast on the 6 mHz and 16 mHz frequencies. Tr. 155-157.

[3] Hallam holds a degree in physics from Bethany College and a degree in electrical engineering from the University of Tennessee. Tr. 142.

[4] Radio New York International, Inc. was a corporation established by Weiner to handle any monies received from sales or promotions obtained in connection with the broadcasts from aboard the Sarah. Tr. 95.

[5] Weiner, Ferraro and Randy Steele currently have a 4 hour program on Sunday nights on WWCR, Knoxville, Tennessee, a licensed international shortwave station. Weiner and his associates were approached by the licensee to do the program following Weiner's sending a letter to "Popular Communications" stating they were off the air and would like to legally get back on the air. Tr. 122-125.

[6] The Rule has been relaxed to allow a licensee to locate its main studio outside the community of license but within the station's principal community contour. *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215 (1987).

[7] As noted in the *HDO*, the United States is a member of the International Telecommunications Union (ITU) of the United Nations and is a signatory to the International Telecommunications Convention, the basic instrument of the ITU and the implementing authority for the current administrative Radio Regulations of the ITU. These regulations have been incorporated by reference into Section 2.100 of the Commission's Rules. Article 30 of the Radio Regulations of the ITU, which is binding on members, prohibits the establishment and use of broadcast stations on board ships outside national territories.

[8] WBC contends that 6(f) must be limited to those broadcasts which occurred on the dates specified in the issue. Weiner ignores the fact that the resumption of broadcasts aboard the Sarah was the subject of admissions which WBC agreed to without objection. Further, at hearing, no objection was made as to the introduction of such evidence. Moreover, the events occuring after the initial broadcasts are relevant under the issue since they are part and parcel of the same transaction and help illuminate Weiner's motive and intent in engaging in these illegal broadcasts. Furthermore, even if WBC's position was sustained, it would not affect the conclusion that WBC and Weiner are not fit to be a Commission licensee.

[9] There is no basis, as argued by WBC to permit Weiner to make a further showing of his good character. Weiner has been afforded ample opportunity to present mitigating evidence. Such mitigating evidence, however, does not offset Weiner's pattern of misconduct, as revealed by this record. In this connection, *RKO General, Inc., (WAXY-FM)*, 5 FCC Rcd 642 (1990), cited by WBC is inapposite. First, in *RKO General*, the Commission made clear that a *Grayson* determination would not be routinely made in the case of new applicants. The Commission undertook one in the RKO proceeding only because of the public interest benefits of entertaining settlements in that proceeding, a factor not present here. Moreover, as noted by the Bureau, unlike the cited case where the misconduct was isolated, the transgressions here are part of a pattern "suggesting a pervasive unwillingness or inability to meet the basic responsibilities of a licensee." 5 FCC Rcd at 644.

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decisin shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-112

In re Applications of

LOWNDES COUNTY BROADCASTING	File No. BPH-880226ML
ALBERT LEON BROOKS	File No. BPH-880301MT
SKY BROADCASTING COMPANY	File No. BPH-880301NU

For Construction Permit for a
New FM Station on Channel 299A
in Valdosta, Georgia

Appearances

Julian P. Freret, Esq. on behalf of Lowndes County Broadcasting; *Bradford D. Carey, Esq.* and *Marjorie R. Esman, Esq.* on behalf of Albert Leon Brooks; *Eric S. Kravetz, Esq.* on behalf of Sky Broadcasting Company; and *Charles E. Dziedzic, Esq.*, and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: July 10, 1991; Released: July 17, 1991

PRELIMINARY STATEMENT

1. The competing applications of Lowndes County Broadcasting ("LCB"), Albert Leon Brooks ("Brooks") and Sky Broadcasting Company ("Sky") were designated for hearing in this proceeding to select a permittee to construct and operate a new FM radio station on Channel 299A at Valdosta, Georgia. *Hearing Designation Order* (DA 90-308), 5 F.C.C. Rcd 1907, released March 27, 1990, and published at 55 Fed. Reg. 12419 (April 3, 1990).

2. A Joint Request For Approval Of Settlement Agreements was filed by the parties on April 12, 1991. The Agreement contemplates a grant to Brooks and the dismissal of the applications of LCB and Sky in return for payments of $90,000 and $110,000 respectively. However, there are pending against Brooks an air hazard issue and a disqualifying real party-in-interest issue that must be favorably resolved before Brooks is qualified to receive a grant.

3. To meet those issues, Brooks filed Motions For Summary Decision on April 5 and April 17, 1991, and a Supplement on May 10, 1991. The Bureau filed Comments on May 15, 1991, in support of the relief sought by Brooks and the settlement. Lowndes also filed a Motion For Summary Decision on April 19, 1991, seeking relief on a disqualifying character issue that is opposed by the Bureau because Lowndes will receive no grant in this proceeding.

FINDINGS OF FACT

4. The issues to be addressed in this Summary Decision are the following:[1]

A. To determine whether there is a reasonable possibility that the tower height and location proposed by Albert Leon Brooks in his Amendment filed September 14, 1990, would constitute a hazard to air navigation (FCC 90M-3354).

B. To determine whether Robert B. Quattlebaum is a real party-in-interest in the application of Albert Leon Brooks and the effect thereof on the qualifications of that applicant to be a Commission licensee (FCC 91M-380).

Air Hazard Issue

5. On September 14, 1990, Brooks filed a proposed Amendment that would change his proposed transmitter site due to an unforeseen loss of a reasonable assurance of the first site's availability. That Amendment was accepted. *See Memorandum Opinion and Order*, FCC 90M-3354, released October 24, 1990. But the new site raised an air hazard issue that was added by the Presiding Judge. *Id.*

6. By letter dated December 10, 1990, the FAA notified Brooks that its preliminary review had revealed a potential electromagnetic interference (EMI) problem and that therefore a determination of hazard might be issued. By *Statement for the Record* filed on January 10, 1991, Brooks reported this fact to the Commission. In order to avoid delay, on or about March 7, 1991, Brooks filed a Second Petition for Leave to Amend, specifying an engineering proposal that had already been approved for Sky. The Bureau also supported acceptance of that Amendment. By *Memorandum Opinion and Order*, FCC 91M-1133, released March 28, 1991, the Presiding Judge granted the Second Amendment. It is accepted as a finding of fact that the FAA has determined that site selected by Brooks for tower construction will not present any hazard to air navigation.

Real Party-In-Interest Issue

7. The evidence offered in support of Brooks' motion include: Declaration of Brooks dated April 15, 1991 and Supplemental Declaration of Brooks dated May 8, 1991; Declaration of Robert B. Quattlebaum dated April 13, 1991 and Supplemental Declaration of Quattlebaum dated May 8, 1991; Deposition of Brooks taken on September 12, 1990; Letter dated August 19, 1990 from Brooks to Quattlebaum; and Brooks' Integration and Diversification Statement dated June 29, 1990. Such evidence has sufficient reliability to meet Brooks' burden of proof on the added issue.

8. Brooks, an experienced broadcaster, first approached Quattlebaum, a wealthy friend, about Brooks' interest in pursuing the Valdosta allocation. Quattlebaum had earlier assisted Brooks with loan financing to start a construction

business. Quattlebaum offered Brooks similar financial assistance with his pursuit of the Valdosta allocation if Brooks desired such assistance.

9. Brooks filed as a sole proprietor on March 1, 1988. Quattlebaum's daughter practices law in Atlanta and Brooks asked him to check with his daughter about communications counsel. Mr. Bradford D. Carey was recommended by the daughter. Brooks and Quattlebaum telephoned Carey and discussed procedures, including Quattlebaum's limited role as financier. In that regard, Quattlebaum loaned Brooks $12,000 for expenses and agreed to serve as guarantor on a bank loan. Brooks' total prosecution expenses are $65,000 and he has raised the balance through other loans that are unrelated to Quattlebaum, and a sale of real estate.

10. Brooks assumed all responsibility for preparing the application with his attorney's advice. Counsel also offered advice on selecting an engineer which Brooks accepted. Then, with assistance from the engineer, Brooks found an antenna site, spoke with the owner, and negotiated a commitment of reasonable assurance. Brooks prepared cost estimates with an outside consultant, made his own programming plans, set up a local public inspection file, and arranged for newspaper publication. Quattlebaum played no role in these events.

11. It also appears from a previous ruling denying a financial issue that Brooks independently arranged for his financing. *See Memorandum Opinion and Order*, FCC 90M-3352, released October 24, 1990. Brooks met with a bank officer a month before filing his application. She was familiar with Brooks' financial condition as he was a customer of the bank. Brooks also furnished her with handwritten cost estimates which was later typed and placed in the bank officer's file. A bank letter was issued on February 26, 1988. Quattlebaum furnished a written assurance to act as guarantor on that same date. *Id.* Those earlier rulings on Brooks' financing are consistent with the representation by Brooks and Quattlebaum that Quattlebaum has played no active role in connection with the prosecution of Brooks' application.

12. Brooks and Quattlebaum assert categorically that Quattlebaum has no interest in Brooks' application and no future interest in the station if Brooks receives a grant. Also, Quattlebaum, an established physician, denies ever having an interest in the broadcast industry. Brooks, to the contrary, had experience in college working at an FM station. He later worked as a radio announcer in Brunswick, Albany and Valdosta, Georgia. He also has worked in commercial radio as an engineer. Thus, there is evidence to conclude that Brooks intends to own and operate the station without any business input or influence from Quattlebaum.

CONCLUSIONS OF LAW

13. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Brooks has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, it is concluded that Brooks has met his burden.

14. In light of the conclusive evidence showing that Brooks' new site has already received clearance from the FAA, there is no genuine issue of material fact about hazards to air navigation to resolve in this case. *See also* Bureau's Comments (Brooks is entitled to summary decision on air hazard issue). Therefore, summary decision on the air hazard issue in favor of the applicant is appropriate.

15. The only evidence of a connection between Quattlebaum and the Brooks venture for a Valdosta station is the $12,000 loan and an undertaking to serve as guarantor. But financing, without more, "does not confer a cognizable interest" because financial arrangements such as these do not provide control over business operations. *Dorothy J. Owens*, 5 F.C.C. Rcd 6615, 6617 (Comm'n 1990). *Cf. Rayne Broadcasting Company, Inc.*, 5 F.C.C. Rcd 3350 (Review Bd 1990) (broadcaster's father provided financing and actively participated in settlement negotiations). Under similar circumstances, where a friend of the applicant offered to secure a bank loan and other financial assistance, the Review Board held that loans alone were not the equivalent of control and such circumstances were insufficient to support allegations of undisclosed real party-in-interest. *Warwick Broadcasting Corp.*, 16 F.C.C. 2d 1030 (Review Bd 1969). Accordingly, Brooks also is entitled to summary decision on the issue of whether Quattlebaum was an undisclosed real party-in-interest.

SETTLEMENT

16. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

17. The Joint Request was filed timely in accordance with §73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules. Also, the Bureau has no objection to approving the settlement.

18. There has been compliance with the local publication requirements of the Commission's rules. 47 C.F.R. §73.3594(g). The parties have paid the required hearing fees. 47 C.F.R. §1.221(g). The public interest will be served by approval of this agreement which will eliminate the need for further litigation and the corresponding utilization of resources, and which ensures that a new FM

service will be delivered to Valdosta, Georgia at an earlier date. Accordingly, it is appropriate and in the public interest that the proposed settlement be accepted.

RULINGS

IT IS ORDERED that the Motion For Summary Decision filed on April 5, 1991 and on April 17, 1991, by Albert Leon Brooks ARE GRANTED and the issues ARE RESOLVED in favor of the applicant.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Settlement Agreements filed on April 12, 1991 IS GRANTED and the Settlement Agreements ARE ACCEPTED.

IT IS FURTHER ORDERED that the applications of Lowndes County Broadcasting (File No. BPH-880226ML) and Sky Broadcasting Company (File No. BPH-880301NU) ARE DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Albert Leon Brooks (File No. BPH-880301MT) for a Construction Permit for a new FM Station on Channel 299A2 at Valdosta, Georgia IS GRANTED.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] There will be no resolution of the issue that was added against LCB:

> To determine whether Lowndes County Broadcasting misrepresented the facts or was lacking in candor in its Opposition to Motion to Enlarge the Issues dated May 16, 1990 in response to Brooks' earlier Motion to Enlarge the Issues and, if so, to determine the effect thereof on Lowndes County Broadcasting's qualifications to be a Commission licensee (90M-2671).

The Bureau's argument is correct that the consideration of LCB's motion for summary decision would be inconsistent with the Commission's policy against using litigation resources to resolve issues that are rendered moot, through settlement, for purposes of the case at hand. *See Allegan County Broadcasters, Inc.*, 83 F.C.C. 2d 371 (1980) (if dismissing applicant does not receive the grant the allegations can be revisited at a licensee's renewal or in a future proceeding).

[2] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For Construction Permit
Secaucus, New Jersey

Appearances

James R. Denvir, Esq., Randall L. Sarosody, Esq., Elizabeth Haile Hayes, Esq., Michael R. Gardner, Esq., and *Charles R. Milkis, Esq.*, on behalf of WWOR-TV, Inc.; *John K. Cooper, Esq.*, and *Roy W. Boyce, Esq.* on behalf of Garden State Broadcasting Limited Partnership; and *Charles E. Dziedzic, Esq., Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION ON REMAND OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: July 3, 1991; Released: July 15, 1991

PRELIMINARY STATEMENT

1. A *Partial Initial Decision* [1] of the undersigned Administrative Law Judge (FCC 91D-1), reported at 6 F.C.C. Rcd 131 (1991) ("*PID*"), was remanded by the Commission to consider additional evidence.[2] *See Memorandum Opinion and Order*, FCC 91-65, released March 4, 1991, reported at 6 F.C.C. Rcd 1524 ("*MO&O*").

2. The Presiding Judge had held that:

> the evidence of record, considered as a whole, does not establish that Garden State's application lacked *bona fides* when it was filed, or that Garden State's application was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, or that Garden State abused a Commission process through its application or otherwise, or that Garden State misrepresented or lacked candor in certifying that it did not file its application for an improper motive or lack of good faith.

PID at Para. 58. Following that ruling, the Commission took the record for review on its own initiative because of its "expressed concern regarding abuse of process and its detrimental effects on licensing procedures that serve the public interest."[3] 47 C.F.R. §1.276(b). The Commission remanded the case for further litigation in two areas of inquiry.

Commission Concerns

3. The Commission's "main concern" focused on:

> the credibility of Garden State witnesses and the weaknesses identified by the ALJ and Mass Media Bureau. Certain troubling aspects of the hearing record, most notably repeated significant memory lapses of Garden State's witnesses, bear close examination.

MO&O at Para. 8. These memory lapses will be reconsidered in two contexts: the date of a meeting among Ms. Wells, Mr. Cohen and Mr. Fetner at which it was decided to form a venture to challenge WWOR-TV's renewal application; and the recollection of Mr. Cohen and the absence of any recollection of Ms. Wells with respect to the subject of settlement at that meeting. Testimony of Ms. Wells and Mr. Cohen was heard on April 22, 1991, and additional documentary materials offered by Garden State and the Mass Media Bureau were received in evidence. (Garden State Exhs. 10 to 17 and MM Bur. Exh. 7.)

4. The Commission's second concern was the absence of any evidence on the financial qualification/certification issue. That issue had been added against Garden State by the Presiding Judge at the request of WWOR-TV at the early prehearing stages of the proceeding. *Memorandum Opinion and Order*, FCC 88M-3567, released October 25, 1988. The limited hearing held in October 1990 was set by the Presiding Judge in order to address the *bona fides* of a proposed settlement under an added §311(d) issue. But there was no evidence taken on the other added issues concerning Garden State's financing. On that evidentiary omission the Commission ruled that:

> While it is not necessary to resolve the financial qualifications issue against Garden State to approve a settlement, we believe that evidence concerning the *bona fides* of the financial certification is directly relevant to ascertaining whether Garden State filed its application in good faith. Thus, we are remanding this proceeding to the ALJ to gather further information related to Garden State's intent when it filed its application by resolving questions related to Garden State's financial certification and the steps it took in preparing its application that support its position that it filed the application in good faith, with a serious intent to obtain the license for Channel 9. We believe that this additional information is necessary to resolve the question of whether, based upon the totality of the evidence gathered in this proceeding, Garden State's intentions were *bona fide* when it filed its application.

MO&O at Para. 11 [footnotes omitted]. Testimony of Mr. Ray M. Stanfield, Ms. Wells and Mr. Cohen relevant to Garden State's financial certification was taken on April 22, 1990 (Tr. 2024-2269).

Hearing Preparation

5. Following remand, the Presiding Judge set a Prehearing Conference for March 12, 1991. *See Order* FCC 91M-845, released March 5, 1991. The Commission had instructed the Presiding Judge to inquire into "evidence concerning the *bona fides* of the financial certification" of Garden State (*MO&O* at Para. 11). The Presiding Judge ordered WWOR-TV to provide relevant documents to Bureau Counsel including documents obtained in discovery and trial preparation documents.[4] *See Order* FCC 91M-884, released March 7, 1991. And the burden of proceeding and the burden of proof on its financial certification and qualifications were assigned to Garden State. *Id.* at fn. 3.

6. The Presiding Judge also required Mr. Cohen to submit his personal diary for 1987 for *in camera* review. *See Order* FCC 91M-947, released March 14, 1991; *Order* FCC 91M-972, released March 15, 1991; *Order* FCC 91M-1008, released March 19, 1991; and *Order* FCC 91M-1060, released March 22, 1991. Garden State was required to provide the written frozen testimony of Mrs. Sondra Fetner[5] in advance of the hearing. The proposed testimony of Mr. Stanfield, Ms. Wells and Mr. Cohen was set forth in sworn testimony and in a Trial Brief. *Id.* Garden State was directed to continue to assure that all relevant documents responsive to the Bureau's Motion For Production Of Documents which was filed on March 8, 1991, were produced. *Order* FCC 91M-947, released March 14, 1991.

7. There is no reason to suspect that any relevant documentary evidence went undetected. At the first Prehearing Conference, which was held on March 12, 1991, disclosure was made by Garden State's counsel that based on a search of the records of the law firm of Cohen & Berfield, receipts were found of an airline ticket and a restaurant receipt. Those documents were used by Mr. Cohen to refresh his recollection as to when the meeting had taken place between himself, Ms. Wells and Mr. Fetner. He was then prepared to testify that the meeting took place on April 30, 1987. Mr. Cohen's records and testimony were corroborated by a credit card receipt of Mr. Fetner's that was located at the conclusion of Mrs. Fetner's testimony on April 22, 1991. (Garden State Exh. 17.)

Newly Produced Evidence

8. In the earlier hearing, the best estimate of a period of time that Mr. Cohen and Ms. Wells could make as to when that meeting occurred was sometime during the three month period of April 15, 1987 and July 16, 1987, *PID* at Paras. 32-36. Yet on March 12, 1991, within eight days of the Commission's remand, the law firm of Cohen & Berfield admitted to be in possession of definitive evidence of the date of the meeting. *See Memorandum Opinion and Order*, FCC 91M-1179, released April 3, 1991. That development will be considered in addition to related testimony of Garden State on the settlement/abuse of process issue that was remanded and on lack of candor issues that were added after remand by the Presiding Judge. *See Memorandum Opinion and Order*, FCC 91M-1179, released April 3, 1991. Those issues were added *sua sponte* after the disclosure of the documents on March 12, 1991, and after a representation was made by Garden State to the Commission that Garden State had not previously considered the significance of such evidence that would enable the hearing record to reflect a date certain for the meeting. For in response to the Commission's issuance of the *MO&O*, Garden State filed a Petition For Reconsideration[6] on March 29, 1991, in which it represented to the Commission:

> Mr. Cohen was asked during the hearing as to whether his datebook reflected the pertinent date; however, it did not. (Tr. 1435-37). The Bureau in its proposed findings filed December 13, 1990 suggested at p. 31 that the date might be subject to verification from business receipts generated by the event. The record at that point, however, was closed. Neither the Bureau nor any other party had focused on this possibility during discovery or at the hearing.
>
> *Garden State did not recognize at that juncture the significance that has now been given to this matter*; however, a search was made promptly after the release of the *MO&O*. *An airline and restaurant receipt has been found suggesting that the meeting occurred on April 30, 1987.* Other parties and the ALJ were promptly informed of the receipts (Tr. 1908-09) which will be entered into evidence in the remand.

Garden State Petition at 6 fn. 2. (Emphasis added.) On April 22, 1991, the receipt for Cohen's airline ticket, his credit card for Jake's on April 30, 1987, and Mr. Fetner's credit card receipt for dinner at Marcella's Restaurant were received in evidence. (Garden State Exhs. 12, 17; Tr. 2210, 2252.) The evidence, in its totality, conclusively establishes the date of the Cohen-Wells-Fetner meeting to be April 30, 1987.

The Issues On Remand

9. The following issues are those that require findings and conclusions on remand:

Settlement/Abuse of Process

I. [T]o determine the facts and circumstances of the motive and the *bona fides* of the filing of Garden State Broadcasting Limited Partnership's application, whether those facts and circumstances show that the application of Garden State Broadcasting Limited Partnership was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, thereby abusing the Commission's process, whether Garden State Broadcasting Limited Partnership has misrepresented or lacked candor in certifying that it did not file its application for an improper motive and lack of good faith, and the impact thereof on the basic qualifications of Garden State Broadcasting Limited Partnership to be a Commission licensee.

Memorandum Opinion and Order, FCC 88M-3567, released October 25, 1988.

Absence of Candor

II. To determine whether Garden State Broadcasting Limited Partnership was lacking in candor in connection with a failure to produce documentary evidence prior to the testimony of Ms. Jean Wells and Mr. Lewis I. Cohen in October 1990, on the subject of a meeting in New York City between and among Ms. Wells, Mr. Cohen and Mr. and Mrs. Fetner in 1987.

III. To determine whether Garden State Broadcasting Limited Partnership was lacking in candor in the testimony of Ms. Jean Wells and/or in the testimony of Mr. Lewis I. Cohen before the Presiding Judge in their respective failure to recall the date(s) of the aforesaid meeting in New York City, when documents that could have disclosed the dates were in the possession or under the control of Ms. Wells and/or Mr. Cohen.

IV. To determine in connection with failures to produce relevant documents that were in existence prior to the hearing that took place from October 19-29, 1990, which documents continued to be unproduced on the date that Garden State filed a Reply brief on December 20, 1990, and which documents were not sought to be introduced into evidence by Garden State by motion to reopen the record before decisions were issued by the Presiding Judge or by the Commission, whether Garden State Broadcasting Limited Partnership was lacking in candor to the Commission.

V. To determine in light of the evidence adduced under Issues II, III and IV above, whether Garden State Broadcasting Limited Partnership abused the Commission's hearing process, is disqualified from participating in a monetary settlement for which Commission approval is sought, and/or is disqualified to become a Commission licensee.

In conformance with the direction to expedite the remand, substantially the same quantum of evidence has been applied to Issue I and the lapse of memories with respect to the Wells-Cohen-Fetner meeting, and to the added Issues II, III, IV and V with respect to candor. The parties were so apprised prior to the remand hearing. *See Order* FCC 91M-1310, released April 16, 1991.

10. A one-day hearing was held in Washington, D.C. on April 22, 1991. Testimony was presented by Garden State of the following witnesses: Mrs. Sondra Fetner, Ray M. Stanfield, Jean Wells and Lewis I. Cohen. The burden of proceeding and the burden of proof had been assigned to Garden State on all issues. *Memorandum Opinion and Order*, FCC 91M-1179, *supra* at 5. All testimony was taken under a universal sequestration order which remained in effect until the record was closed for all purposes on May 17, 1991.[7] *Order* FCC 91M-1432, released April 24, 1991. Proposed Findings of Fact and Conclusions of Law were filed on May 17, 1991, by WWOR-TV, Garden State and the Bureau, and optional Reply Proposed Findings and Conclusions were filed on May 24, 1991 by Garden State. *Id.* The Bureau seeks a decision against Garden State on an unlawful filing, abuse of process and lack of candor. WWOR-TV offers no conclusions. Garden State argues for exoneration on all issues and authorization for the payoff. Findings below on filing for settlement, abuse of process, and lack of candor disqualify Garden State from participation in a settlement or in receiving a Commission grant, and this proceeding now can be terminated.[8]

FINDINGS AND ANALYSES OF FACT

Background

11. The Findings of Fact of the *PID* (Paras. 8-47) will be referred to where they give meaning to the context of the evidence received in remand. To review briefly the backdrop to this decision, in 1986, RKO General, Inc. ("RKO"), was the licensee of Station WOR-TV (Channel 9), Secaucus, New Jersey. Mainstream Television Limited Partnership ("Mainstream") challenged an assignment from RKO to a subsidiary of MCA, Inc., the parent company of WWOR-TV. It was Mainstream's intention to ask the Commission to require RKO to file an early renewal application against which Mainstream would file a competing application. (Tr. 1205-1206.) A settlement ultimately was reached between RKO and Mainstream and, on April 1, 1987, RKO paid Mainstream $5.37 million. (Tr. 1419; WWOR Exhs. 38, 39.) On April 3, 1987, MCA, Inc. ("MCA"), parent to WWOR-TV, Inc., took over control of the station, and the call sign was changed to WWOR-TV. (Tr. 1432.)

12. In 1986, Ms. Wells, an Afro-American female who resided in Teaneck, New Jersey, was recruited by Mr. Cohen as the general manager of the Mainstream partnership venture which challenged the transfer of the license for Channel 9 from RKO to MCA. Ms. Wells also had non-television broadcast experience. (*PID* at Paras. 14-16.)

13. In early 1987, Mainstream negotiated a settlement of $5.37 million from RKO in return for Mainstream dropping an appeal from the Commission's grant of the MCA assignment. Ms. Wells' share of the settlement was $178,694. Mr. Fetner, and his wife Sondra, received $1.3 million. Payments were made by Cohen & Berfield to Wells and Fetner on April 7, 1987. Cohen & Berfield's fees were $528,500. MCA had begun operating on Channel 9 through its subsidiary, WWOR-TV, on April 3, 1987. (*PID* at Paras. 28-30.)

Significant Evidence Of The April 30 Meeting

14. Now it is established that with ink barely dry on the RKO/Mainstream payoff checks, Mr. Fetner was ready in April 1987 for a similar speculative venture. At the same time, Mr. Cohen was working as counsel for another broadcast venture in Poughkeepsie in which Ms. Wells was a principal. [9] The Presiding Judge previously was unable to definitively conclude from Ms. Well's testimony, when it was that she became aware of WWOR-TV's "imminent license renewal" in a telephone call that she had with Mr. Cohen in the Summer of 1987. (*PID* at Para. 32.) Now, with the new evidence that decisively establishes that Garden State's promoters met on the 30th of April, the April 1987 scenario and the related testimony present a substantially clearer picture. Cohen and Wells were working together on the Poughkeepsie proposal which was filed on April 15, 1987. The checks from the RKO-Mainstream settlement were mailed the previous week on April 7, 1987. And now we know that the

Cohen-Wells-Fetner meeting in New York took place on April 30, 1987. Therefore, it is concluded that Ms. Wells knew from her contacts with Cohen prior to April 30 the date when WWOR-TV's renewal had to be filed and Wells knew from her contacts with Cohen that a new venture would be able to comparatively challenge WWOR-TV for Channel 9 when it came up for renewal in April 1988. *See In re RKO General, Inc.*, 1 F.C.C. Rcd 1081, 1098 (1986).[10]

15. But there remains a conflict in the testimony of Ms. Wells and Mr. Cohen with respect to the events in April that must be resolved. Cohen testified that he was told by Wells of an awareness on her part that WWOR-TV had to file for renewal when she told him that WWOR-TV had not improved on RKO's programming for Northern New Jersey. Wells testified that it was in the Summer of 1987 that Cohen told her of the need for WWOR-TV to renew its license. The Cohen testimony of October 25, 1990, is as follows:

Mr. Sarosody. Had anything - - - to your knowledge had anything changed with respect to Ms. Wells' view towards Channel [9] or obtaining the license for Channel 9, between the time - - - Mainstream settled and the time that she approached you to seek the license again? - - -. [Question repeated at Mr. Cohen's request]

Mr. Cohen. Mrs. Wells told me, as I recall, that Mainstream's application had never been accepted by the Commission and she was aware that MCA had to file an application for renewal of license. She was also aware that there would be - - - that a new entity such as Garden State would have an absolute right to be compared against MCA, which was not the situation earlier.

(Cohen, Tr. 1530-31.) Mr. Cohen immediately followed that answer with an unqualified statement of Ms. Wells' that he recalled had taken place in April 1987:

> She [Ms. Wells] also told me that she was - - - she believed after her viewing, that the station was not acting as an outlet for local expression in Northern New Jersey. She said that hadn't changed, it hadn't done that, in her view, under RKO's stewardship and it wasn't doing it under MCA's stewardship. She said that she thought that that was something that was very important.

(Cohen, Tr. 1531-32.) Ms. Wells, who had been sequestered, testified on October 29, 1990, in response to Bureau Counsel's questions on the same subjects as follows:

Mr. Schonman. Do you know when they [applications for Poughkeepsie and Center Moriches] were filed?

Ms. Wells. Yes, April 15, 1987.

Q. Could your conversation with Mr. Cohen involving Channel 9 have come up on or about the time that these applications were filed?

A. No.

Q. Does that give you some frame of reference to narrow down the date that you spoke with Mr. Cohen about Channel 9?

A. Yes, I think that when I spoke with Mr. Cohen it was sometime in the Summer.

Q. Why do you think it was summertime?

A. Well, for one thing, *if it was April 15th, MCA had just taken the station over and they would barely have had time to make any changes at all.* [Emphasis added.]

Q. How much time did you think was necessary for MCA to effect changes in the program?

A. I didn't think about it. I didn't make any judgement as to how long was necessary, but two weeks, actually less than two weeks, I don't think I would have been -- *I wouldn't have made that judgment in two weeks.* [Emphasis added.]

Q. There came a time, did there not, when you became aware that WOR's -- WWOR'S license was coming up for renewal, is that correct?

A. Yes.

Q. When did you first become aware of that?

A. Sometime in late -- in the summer, late July or August.

Q. Of 1987?

A. Yes.

Q. How did you come to know that?

A. Discussion with Mr. Cohen.

Q. Can you tell me about that discussion?

A. It was a follow up to our -- to his -- to our phone call or to the phone call discussion in which he said that I indicated my thoughts about Channel 9, about WWOR and he said that it was interesting, let him think about it. *And then at some subsequent point, he said that the license was up for renewal.* [Emphasis added.]

Q. That's all he said, the license is up for renewal? What did that mean to you?

A. I don't know that that's all that he said and what it meant to me was that I did know that licenses could be challenged.

(Wells, Tr. 1836-37.) But Ms. Wells also was inconsistent in her own account. As she testified above, she could not have made a judgment about WWOR-TV's programming in just two weeks time. Yet she had earlier testified in the same day that the "essence" of her conversation with Mr. Fetner, which we now learn was on April 30, 1987, was her interest in programming on Channel 9 which she found to be similar to RKO in its failure to meet New Jersey needs. (Wells, Tr. 1741.)

16. This testimony of Wells was revisited on remand in order to assess it in light of the April 30 meeting date. Previously, the *PID* was issued by the Presiding Judge under the assumption of a sliding four month time frame which could have reached as far out as July 1987. Now, having learned through Mr. Cohen's and Mr. Fetner's restaurant receipts that the dinner was on a date which Ms. Wells testified would provide too short a period of time within which to assess MCA/WWOR-TV programming, the testimony of Mr. Cohen and Ms. Wells that was offered to prove that her concern for programming was the motivating factor for deciding to acquire the station, inferring and arguing that such evidence is probative of an intent not to have filed for the purpose of settlement, is rejected. To obtain Garden State's perspective on this testimony before and after the disclosure of the April 30 date, the first set of Garden State Proposed Findings were examined which had asserted:

> Ample evidence of record establishes affirmatively that Garden State's application was seriously conceived and prosecuted in a manner totally inconsistent with the supposition of an abusive challenge. Thus, Garden State's challenge was premised *from its inception* on perceived inadequacies in WWOR-TV's services to the Northern New Jersey area it is licensed to serve.

(Garden State's Proposed Conclusions, December 13, 1990 at 17.) (Emphasis added.) That conclusion is based on the following assertion of fact.

> Ms. Wells continued to view Channel 9 after the assignment to WWOR-TV and it was her impression that the service being provided had not improved from that provided by RKO. Sometime between April 15, 1987 and July 16, 1987, she mentioned her opinion to Lewis I. Cohen as part of a telephone conversation arising from other matters.

(Garden State's Proposed Findings, December 13, 1990, at 4-5.) Now, with the evidence disclosed by Garden State in March 1991, and after seeing how its former theory was under attack by Bureau Counsel, Garden State now posits a fall-back position:

> Ultimately, the Bureau's conclusion at para. 6c that "concern over the programming *was not the reason* for the challenge - - -" (emphasis added) is in one sense correct. The Bureau errs, however, in asserting that Garden State ever claimed that the *reason* for its filing was a purely abstract "concern over the programming." (Emphasis in original.) *The reason for the challenge was Ms. Wells' desire to operate Channel 9.* (Emphasis added.)

(Garden State's Reply Findings (Remand), May 24, 1991 at 12.) Garden State's treatment of the Bureau's dead-center inference drawn from new substantial evidence is like the perpetrator of a crime in a mystery novel who makes light of newly found incriminating evidence which he was hoping would lay dormant. For what Garden State has done in light of the analysis that the Bureau offers, and in light of the substantial evidence that now establishes an April 30 meeting, is to now try to make light of Ms. Wells' concern for WWOR-TV's local New Jersey programming, while earlier, the record was left in a state by Garden State so as to allow Ms. Wells to testify that she was observing programming into the Summer of 1987 before she spoke with Mr. Cohen about filing a challenging application. Certainly, the latter account would lend a greater credibility to the hypothesis that Garden State had a reasoned concern about local programming and that Garden State was going to seek control of Channel 9 so that appropriate programming changes could be made. Therefore, Garden State had a motive to leave the record in such an unclear state.

17. Now that the record establishes through reliable documents that the two promoters of Garden State, Mr. Cohen and Mr. Fetner, decided on April 30 to challenge WWOR-TV, the motivating reason, according to Garden State, was not because Wells was concerned about WWOR-TV's failure to improve on RKO's programming. Now we are asked to find that the motivating reason was Wells' "desire to operate Channel 9." But if that was Wells' motive, why would she align herself with Fetner who was interested in speculation and the "chase"? And she knew Fetner's motives from their earlier association at Mainstream. With Garden State now having abandoned any assertion, inference, or suggestion that Wells wanted to change Channel 9 programming in order to improve service to the Northern New Jersey community, it is now concluded that her joining with Cohen and Fetner was for the purpose of extracting a profit from a challenge for Channel 9, to result in a settlement which the Garden State promoters had recently learned through the Mainstream experience could be obtained from a licensee and, in any event, would be highly profitable. This conclusion is supported by Ms. Wells testimony on remand:

> Q. And that decision to challenge the renewal was made because it was your opinion that the programming under the stewardship of MCA was the same as that under RKO?
>
> A. Among other things, yes.
>
> Q. What other things? -
>
> A. My own - Mr. Cohen's - Mr. Fetner's business interests - - -. Without him [Fetner] there would have been no money.

(Wells, Tr. 2177-78.) Fetner was in control of the April 30 business decision. Mr. Fetner offered Wells only a 4% equity interest in exchange for her services as general partner of Garden State. (Cohen, Tr. 1449; Wells, 1743.) Mr. Fetner then selected all limited partners for Garden State. (Cohen Tr. 1452-54.) Mr. Fetner, the admitted speculator, had once again joined forces with Mr. Cohen to renew the "chase."

18. The significance of the conflicting testimonial accounts of Cohen and Wells also becomes evident as a result of the ability to now fix the decisional date on April 30th, while previously it could have been as late as the Summer of 1987. For now Cohen's story lacks all credibility when compared with Wells' account. Cohen would have the Presiding Judge and the Commission believe that after two weeks from the time that WWOR-TV started broadcasting, April 3, 1987, Wells had concluded that WWOR-TV was going to improve the programming for Northern New Jersey. Wells flatly contradicts Cohen. She testified that she could not reach that conclusion in two weeks and therefore, it must have been in the Summer that she could have reached any conclusion on programming. Going back to Cohen's version of the events, he testified that the programming was very important to Wells in April 1987, and therefore she had independently acquired a programming improvement motive before she met with Fetner. That public spirited motive attributed to Wells in April 1987 is negated by Wells' testimony that she wasn't even focusing on programming until the Summer. So Cohen has misstated the facts a second time. And Cohen's account that he was informed by Wells in April of the legal technicalities of how Mainstream's application had never been accepted and that WWOR-TV's renewal could be challenged by a new venture (Cohen, Tr. 1530) is found to be a factual fabrication, or an act of witness dissembling. Now, based upon two occasions to observe Ms. Wells' testimony, the Presiding Judge concludes that she has not shown such an awareness of the technicalities of the Commission's renewal processes to a degree that would support accepting the testimony of Mr. Cohen that she had so instructed or informed him. (Cohen Tr. 1530-31.) For she flatly contradicted Cohen's account when she testified that it was in July or August of 1987 that Cohen had told her about WWOR-TV's need to renew its recently acquired license. (Wells, Tr. 1836-37.) She did testify that she had a general awareness that "licenses could be challenged" (Tr. 1837) but that general knowledge was imparted to her by Cohen & Berfield.

19. Based on the above review of Cohen's testimony, and in light of the newly disclosed evidence that established the Cohen-Wells-Fetner meeting on April 30, 1987, it is found that between April 3, 1987, the date that WWOR-TV began operating Channel 9, and April 30, 1987, with Cohen having ample occasions to be in contact with Wells in connection with other pending broadcast applications, Cohen solicited Wells to participate as the designated general manager in a new venture in order to challenge WWOR-TV's license renewal without any consideration having been given in April 1987 to changing WWOR-TV's programming for Northern New Jersey. The fictional initiative on Wells' part that she was concerned about local programming before she met with Mr. Fetner, was intended to convince the Presiding Judge and the Commission that Mr. Cohen took Ms. Wells' fortuitous public spirited solicitation back to Mr. Fetner who had told Cohen in March 1987 (Cohen, Tr. 1424-27) that he was interested in any new speculative opportunity to turn a profit. (*PID* at Paras. 31, 33.) If Cohen could convince the fact finders of that scenario, the finding of a motive of filing to settle could be evaded or, sufficiently deflated, to defeat the §311(d) issue that Cohen and Wells were facing. But now, with new evidence and a reargued brief from Garden State, any altruistic programming motive for Garden State's application evaporates. Now the record shows that Cohen, Wells, and Fetner, fostered by Fetner's desire for profitable speculation that was aided and abetted by Cohen, wanted to reap a second profit with a new Channel 9 challenge that contemplated obtaining a second ultra-profitable settlement. And alternatively, what is missing from the record is a quantum of reliable evidence that Garden State did not file for the purpose of securing a settlement from MCA/WWOR-TV. In other words, with the new evidence that places the meeting in temporal context, and the related collapse of Wells' program review due to the shortness of time, Garden State fails to meet its burden of proof.

20. Turning again to the April 30 meeting, Mr. Cohen tried in his October 25 testimony to present the meeting as merely mutual opportunities for Mr. Fetner and Ms. Wells to assess each other before deciding to join in a venture. In other words, would Mr. Fetner and Ms. Wells be "compatible"? (*PID* at Para. 34.) That conclusion was reached based on Mr. Cohen's testimony that the "purpose" of the meeting "was to see whether - - - Sidney Fetner and Jean Wells had good chemistry - - -." (Cohen, Tr. 1443-44.) This was the portion of the testimony where Mr. Cohen testified unequivocally: "- - - *with the Lord as my witness that there was never one word mentioned of settlement at that dinner* - - -." (Cohen, Tr. 1446.) (Emphasis added.) The Presiding Judge shares the Bureau's refusal to accept Mr. Cohen's unqualified recollection that settlement was not mentioned in light of so many other inabilities to recall.[11] But even if Mr. Cohen had a precise recollection, maybe not the word "settlement" was spoken at dinner but certainly the concept was present as an existing fact. (*PID* at Para. 56.) Mr. Cohen also testified that at the dinner, Mr. Fetner asked Ms. Wells " *many, many, many questions about what she had been viewing, and why she felt the way she did.* " (Cohen, Tr. 1445.) (Emphasis added.) But that testimony is not accepted as true or accurate. As discussed above, Ms. Wells testified that it was not until the Summer of 1987 that she focused on WWOR-TV programming. In addition, we learned at the remand session that Ms. Wells could not recall even one program that she had watched to form an opinion that the WWOR-TV programming was not responsive to New Jersey. (Wells, Tr. 2178-79.) Nor had Wells consulted Mainstream's and later Garden State's expert, Dr. John-

son, about programming before the April 30 meeting. (Wells, Tr. 2181.) Therefore, Mr. Cohen's account that Mr. Fetner asked "many, many, many" questions about a subject that Ms. Wells cannot recall and did not focus on until the Summer of 1987 is rejected as hyperbolic or untruthful, but lacking in candor in any event. And there is a similar absence of credibility in Mr. Cohen's testimony that the purpose for the meeting was to assess the "chemistry" of Ms. Wells and Mr. Fetner. On October 29, 1990, Ms. Wells testified that she had had an earlier meeting with Mr. Fetner when he was a limited partner in Mainstream which was a get acquainted meeting. Rather, the April 30 meeting was a business meeting in which the venture was to be created to renew the pursuit of Channel 9 for profit through settlement. (Wells, Tr. 1742.)

21. Considering all of the above credibility infirmities in Garden State's accounts of what transpired on April 30, 1987, it is found as fact that the decision to form a limited partnership occurred at a dinner meeting that was set up by Cohen and Fetner and attended by Wells on April 30 in New York City. It took place about two weeks after substantial sums of money had been distributed to Ms. Wells and Mr. Fetner by the Cohen & Berfield law firm, which money had been realized in a settlement between RKO and Mainstream for $5.7 million. At the same time, the Cohen & Berfield law firm received a substantial fee from Mainstream in the amount of $528,500. (*PID* at Para. 29.) It is established by an inference drawn from the totality of the evidence, including the proximity of time to the successful Mainstream settlement and the prospect for a second round of profits for lawyer and clients arising out of a settlement, that a money settlement with MCA/WWOR-TV was an intended business goal to be achieved by Cohen, Wells and Fetner through a limited partnership that would challenge WWOR-TV's renewal application. That decision was reached collectively by Mr. Cohen, Ms. Wells and Mr. Fetner on April 30, 1987.

Garden State's Financial Certification

22. On December 23, 1987, Garden State certified to the Commission that it was financially qualified to construct and operate a VHF television station at Secaucus, New Jersey. In the remand *MO&O*, the Commission stated:

> [T]he ALJ designated financial certification and financial qualifications issues against Garden State based upon alleged lack of efforts to negotiate the requisite rental agreement (including the substantial cost thereof) for Garden State's proposed antenna site. Garden State did not deny assertions that it failed to contact knowledgeable persons at WWOR-TV or Port Authority, the owner of the antenna site. *This suggests that Garden State did not intend to seriously attempt to obtain the license when it filed its application.*

MO&O at Para. 11. (Emphasis added.) In presenting its evidence, Garden State sponsored the testimony of Mr. Stanfield. (Garden State Exh. 13.)

23. Mr. Stanfield held various responsible positions as an officer of Chapman Associates, Inc., a California-based media brokerage firm, from 1976 to 1989. He is currently Chapman's chairman of the board of directors and a 50% shareholder. He has had broadcast related experience from 1952. He has known Mr. Cohen professionally for 17 years. Also, Mr. Cohen has represented applicants before the FCC in which Mr. Stanfield was a principal. And he has prepared budgets on several occasions for clients that were represented by Mr. Cohen. (Stanfield, Tr. 2126-28.) Thus, Cohen and Stanfield have a long-standing professional/business relationship in connection with preparing budgets for broadcast ventures.

24. In March 1986, Cohen contacted Stanfield about a budget for Mainstream. Cohen and Wells traveled to California to meet with Stanfield. Stanfield testified that he prepared a budget for Mainstream at Cohen's request. (Stanfield, Tr. 2100.) He could not recall the year in which he performed the service. (*Id.*) He testified that he had talked with Ms. Wells about the budget but his testimony in that regard is speculative. (Stanfield, Tr. 2103-04.) He could not even recall "sources" that he had consulted for the Mainstream budget. (Stanfield, Tr. 2104.) Yet he was certain that "some" of the sources of information that he used for Garden State were not the same as Mainstream's sources. (*Id.*) Stanfield did not have a copy of Mainstream's budget and he testified that "it was simply discarded" when Chapman moved its offices in 1987.

25. Cohen also asked Stanfield in August 1987 to prepare a budget for Garden State. (Stanfield, Tr. 2105.) He met with Cohen and Wells in California in August 1987, a few weeks after Cohen requested a meeting. (Stanfield, Tr. 2105-06.) Stanfield testified that he never referred to the Mainstream budget in preparing Garden State's budget. He said that he "really didn't know why." He was not sure he had it in his possession. (Stanfield, Tr. 2106.) After recognizing for the record that both Mainstream and Garden State were seeking Channel 9 in Secaucus and that they were just "a few years apart," he testified that he did not consider the Mainstream budget because he "just didn't consider it;" it was a "new assignment and we started from scratch." (Stanfield, Tr. 2106-07.) When Stanfield was asked by Bureau counsel whether they were "re-inventing the wheel" he answered, over an objection that was denied, that "we simply didn't give any consideration to it." (Stanfield, Tr. 2108.) Stanfield testified that if he had a Mainstream budget, he thinks he might have consulted it. (*Id.*)

26. Stanfield testified that the Mainstream budget had been discarded when Chapman moved and that therefore it could not have been considered. (*Id.*) He initially equivocated on when the move occurred (August or September 1987) and he contradicted himself once in the same answer:

> Q. Do you recall whether you moved before or after that date [of the meeting with Cohen or Wells]?
>
> A. I don't recall whether I moved before or after. The meetings with respect to that took place after the move.

(Stanfield, Tr. 2109.)[12] The one conclusory fact on which Mr. Stanfield never equivocated was:

> The question never arose. I cannot tell you that when I heard that it was there, I would have gone back to it [the Mainstream budget] because *the question never arose.*

(*Id.*; Emphasis added.) And Mr. Stanfield has no recollection of asking Mr. Cohen or Ms. Wells for a copy of the Mainstream budget, although his practice was to provide clients with copies of budgets he prepared. (Stanfield, Tr. 2121-22.)

27. Stanfield could not recall any Mainstream budget, let alone any difference between the Mainstream budget and the Garden State budget:

> I have no notion of what they might have provided with respect to Mainstream. I would not have known that there was a Mainstream had I not been reminded of it in preparation for this hearing.

(Stanfield, Tr. 2111.) Stanfield offered in explanation that preparation of budgets are not important events for him and that budget preparation is only an occasional sideline effort which he does not relish performing. (Stanfield, Tr. 2140.) He had "no idea" whether Garden State's budget [WWOR Exh. 88] was similar to Mainstream's. (Stanfield, Tr. 2121, 2140.) Stanfield could not recall how much of a fee he was paid for the Mainstream budget. (Stanfield, Tr. 2124.) He had conducted a careful search for a Mainstream budget with Mr. Cohen's assistance during the discovery phase of this case and it could not be found. But Stanfield was not aware until the day before his testimony on April 22, 1991, that neither Mr. Cohen nor Ms. Wells had a copy. (Stanfield, Tr. 2123.)

Mainstream's Non-Existent Budget

28. Based on the evidence of record, it is found that neither Mr. Cohen nor Ms. Wells had a copy of the Mainstream budget, that Mr. Stanfield had no recollection of sources used to create a Mainstream budget, that Mr. Stanfield cannot recall the amount of his fee, and in view of the fact that the question of using the Mainstream budget as a starting source for a Garden State budget was not even considered, it is concluded that there never was a *bona fide* Mainstream budget that included data directly relevant to Channel 9, Secaucus, N.J. The Mainstream venture never went beyond opposing an assignment of the broadcast license from RKO to MCA. There was a request for an early comparative hearing with RKO before any assignment occurred, but that request was denied. *RKO General, Inc.*, 1 F.C.C. Rcd 1081 (1986).

29. In connection with that proceeding, Mainstream filed a contingent application on March 31, 1986, in which Mainstream certified that it was financially qualified. (WWOR Exh. 27.) But the request of Mainstream for early filing under 47 C.F.R. §73.3539(c) was never granted and there would be no occasion for discovery. Thus, whether as an oversight or through indifference, a written budget never was prepared for Mainstream or some hard-copy proof, even a cover letter, would have by now materialized. Mr. Stanfield, its purported author, did not recall what sources of information were used or even how much of a fee he had charged for his services. And now having taken Mr. Stanfield's testimony on remand, and having focused on documents relating to Garden State's budget (WWOR Exhs. 88, 91 and Garden State Exh. 6.), it is established that one key source of information on antenna leasing/installation costs through Mr. Fetner's contact at the Port Authority could not have been available to Mr. Stanfield in connection with any Mainstream budget.

30. Mr. Alan Sagner ("Sagner") was a former Chairman of the Port Authority of New Jersey and New York. (Garden State Exh. 16 offered and received in evidence on April 22, 1991.) Sagner met Fetner for the first time on an international air passage in August 1987. After returning to New York, Mr. Fetner called Mr. Sagner and asked for information on costs for transmitting from a tower atop the World Trade Center. (Garden State Exh. 16 at 12.) Mr. Sagner later called an unidentified former contact of his at Port Authority. Mr. Sagner then relayed the information that he obtained to Mr. Fetner. Mr. Sagner cannot recall any dollar amounts; he would not even estimate in a range from $20,000 to $2 million. (*Id.* at 14-15.) Reliability is found to be non-existent with respect to that non-written communication between Sagner and Fetner. Mr. Stanfield testified that an amount of money [$1,100,000.00] was later inserted by Mr. Cohen in the Garden State budget relating to a one time charge for an antenna's installation on the World Trade Center. (Stanfield, Tr. 2130.) Mr. Cohen testified on remand that he had obtained the information about antenna installation costs from Mr. Fetner after Cohen and Wells had left Stanfield's office in California. Mr. Cohen offered no testimony on the ultimate source that Sagner had contacted. (Cohen, Tr. 2217-18; WWOR Exh. 91.)

31. From this evidence, it is concluded that the data on antenna installation was not sought in connection with the Mainstream budget because Stanfield, Cohen or Wells would have recalled such information if it had been utilized in connection with Ms. Wells' certification on Mainstream's Form 301 in 1986, and Mr. Fetner would not have needed to obtain the same information from Mr. Sagner in 1987. In that latter connection, the deposition testimony of Mr. Sagner indicates that he met Mr. Fetner for the first time enroute on an airflight in August 1987. Mr. Fetner's later request for the installation cost was the first time, according to evidence offered by Garden State, that anyone from Garden State or Mainstream had sought that information. (Garden State Exh. 16.) Finally, Mr. Stanfield testified that he was certain that the sources that he used in preparing Mainstream's budget were not the same sources that he used to prepare Garden State's budget. (Stanfield, Tr. 2104.) Similarly, Ms. Wells testified that information requested by Stanfield for Garden State's budget had not been produced by Wells in connection with any Mainstream budget. (Wells, Tr. 2192.) Therefore, it is concluded that neither Mr. Stanfield nor Mr. Cohen nor Ms. Wells had information on antenna installation costs or studio/real estate/rental costs in connection with the Mainstream application. These findings of fact further support the ultimate finding that there was never any written budget prepared for Mainstream because there was not sufficient information available for Stanfield to undertake such a budget.

32. Stanfield continuously asserted in his testimony that he had "no recollection of anything they provided with with respect to Mainstream." In fact, according to Stanfield, he "would not have known that there was a Mainstream had I not been reminded of it in preparation for this hearing." (Stanfield, Tr. 2111.) These categorical

assertions by Stanfield, the purported author of any Mainstream budget, further establishes that there never was a written Mainstream budget. There may have been a piece of paper with numbers. But there was no budget for Mainstream. And the cavalier approach to budget estimation for Mainstream is probative of Cohen's and Well's intent to use the Commission's application process as a device to obtain a settlement. For the Garden State budget was also undertaken in a cavalier manner.

Garden State's Generic Budget

33. The evidence establishes that Mr. Stanfield did not prepare a customized budget for Garden State. The budget he prepared was styled "Projected Construction And Operating Costs For New Independent VHF Television Station In Top Five Markets." (WWOR Exhs. 88, 91.) Mr. Stanfield relied on the following sources: NAB data for television station operations for 1986; information on three operating television stations that were in his possession; and his own general knowledge. (Stanfield, Tr. 2088.) It was not a line-by-line estimate but rather a "broad general [estimate of] general overhead operating items, and we provided generously for them." (Stanfield, Tr. 2118.) It was, in Stanfield's volunteered words, a budget with a "lot of fat." (*Id.*) It is found that the non-analytical use of estimated data to structure a budget with excess "fat" indicates an intentional or uncaring imprecision that negates a *bona fide* budget.

34. In August 1987, Mr. Cohen contacted Stanfield approximately 17 months after the filing of the Mainstream application and four months after the dismissal by settlement of the Mainstream appeal. Mr. Cohen solicited Mr. Stanfield to prepare a budget for Garden State for a new television station on Channel 9 in Secaucus, New Jersey. (Stanfield, Tr. 2084-85, 2105, 2109.) In late August 1987, Ms. Wells accompanied Mr. Cohen to California for the meeting with Mr. Stanfield which took place over a period of one and one half days. (Stanfield, Tr. 2106; Wells, Tr. 2152; Cohen, Tr. 2210-11.)[13]

35. Mr. Stanfield recalled that Ms. Wells discussed her "ideas" about the Station's news gathering, news programming and news scheduling. (Stanfield, Tr. 2113.) Stanfield and Wells discussed a news bureau office for Patterson, New Jersey and a budget allowance was made for such a bureau (Stanfield, Tr. 2115.) Wells wanted an accommodation for three news bureaus outside the station. (Stanfield, Tr. 2113.) Although Stanfield did not provide for a "news bureau" line in his budget, he did provide $1.25 million for the purchase of five news trucks. (Stanfield, Tr. 2117.) Stanfield and Wells also reviewed charts and tables from NAB's 1986 report, observing data for the top ten markets and discussing differences with the second ten tier markets. (Stanfield, Tr. 2114.) But it was not a focused budget prepared with a view towards precision:

Mr. Stanfield: We looked at broad, general overhead operating items, and we provided generously for them. I made no attempt to make a finalized, detailed line by line budget.

(Stanfield, Tr. 2118.) (*See* finding in Para. 33, *supra.*) Stanfield would have charged a higher fee for a detailed budget. (Stanfield, Tr. 2119-20.) He had "no idea" whether similar methodology had been used with respect to the earlier Mainstream budget. (*Id.*)

36. At the conclusion of the meeting, Mr. Stanfield asked Ms. Wells for her "understanding" of costs of studio/office facilities, real estate and its conversion to use as a station, and the cost of a "relocation" of the antenna. (Stanfield, Tr. 2124; Wells, Tr. 2153.) Ms. Wells obtained all of the information except for the antenna cost estimate. (Wells, Tr. 2153.) Ms. Wells was unable to obtain that information which ultimately was provided by Mr. Fetner. (Wells, Tr. 2154.) That information was passed on to Mr. Stanfield but Well's testimony does not disclose whether she or Mr. Cohen was the conduit. (*Id.*) In fact, on October 29, 1987, Mr. Cohen was the conduit, for he wrote a letter to Ms. Wells stating:

> Ray [Stanfield] omitted in his summary of pre-start costs the one time charge for installation of an antenna at the World Trade Center. I was informed the sum is $1,100,000. I have revised the summary of pre-start costs and added the $1,100,000. I am enclosing the revised projected construction and operation costs.

(WWOR Exh. 89; Cohen, Tr. 2215-17.) Mr. Cohen had received that information from Mr. Fetner, who had obtained it from Mr. Sanger, and Mr. Cohen passed it on to Mr. Stanfield. (Cohen, Tr. 2218.) Wells was out of the loop, except for copies.

37. It was after the meeting in California that Mr. Cohen assumed responsibility for completing the Garden State budget. It was sent by Mr. Stanfield to Mr. Cohen, with a copy to Ms. Wells on October 2, 1987 (WWOR Exh. 88). Mr. Cohen considered Mr. Stanfield to have been "dilatory." (Cohen, Tr. 2218.) Mr. Stanfield represented in his transmittal letter which he sent directly to Mr. Cohen:

> Dear Lew:
>
> * * *
>
> I have taken a middle ground approach to typical top-market independent station operations, and it would not be untoward to either reduce or increase them within reasonable limits. I have, however, put rather more emphasis on both equipment and operating costs with respect to news gathering than is typical of major market independents.

(WWOR Exh. 88.) This statement of Stanfield is an admission that there had been no effort to achieve precision; his estimates may be too high or too low. Thus, Stanfield had not prepared a *bona fide* budget for Garden State.

38. Mr. Cohen testified that when he and Ms. Wells had left Stanfield's office, "we knew within a certain small range what the number was." (Cohen, Tr. 2218.) But the testimony of Stanfield and Wells does not mention a range of the antenna costs discussed at the California meeting. Therefore, it is found as a fact that when they left the meeting with Stanfield, neither Stanfield, Cohen

nor Wells had any reasonable factual basis to estimate antenna costs. When Stanfield wrote to Cohen on October 1 and sent his draft budget, Cohen saw that there was no line for the antenna cost and Cohen independently pursued obtaining that information through Mr. Fetner and Mr. Sanger. Mr. Cohen could not recall the sequence of events and whether he received the Stanfield budget before or after Cohen had received the cost estimate figure from Mr. Fetner:

Ms. Laden: But is it your recollection that you gave that number to Mr. Stanfield, before you received the final budget that he had prepared?

Mr. Cohen: I don't recall that, I have no recollection on what the sequence was. I have a distinct recollection though of being the person that interjected, so to speak, that number into the budget. That is what I recall.

(Cohen, Tr. 2218-19.)[14]

39. On October 29, 1991, approximately three weeks after Mr. Cohen received Stanfield's budget, Mr. Cohen sent a re-typed budget to Ms. Wells. (WWOR Exh. 89.) It is evident from the sequence of events and the tone of the Cohen-Wells letter, that Cohen had taken over the responsibility for obtaining and inserting a significant line-item cost estimate that was directly related to Garden State's cost estimate for Channel 9 at Secaucus. The information furnished by Ms. Wells on real estate costs in the Secaucus area were estimates and the other cost estimates that were used by Stanfield were NAB originated costs that related to construction/operating costs in certain unidentified non-east coast television markets. There was no back-up worksheets or drafts with comments that were introduced by Garden State, even though Stanfield's cover letter of October 1, 1987, indicated that relevant "background or reference material" were in his files.[15] It is concluded based on Stanfield's testimony (Para. 33), and the absence of such documentary evidence, that none of the cost estimates, except for antenna installation, related to direct estimates of costs of Garden State's proposed TV station for Secaucus. Mr. Cohen had selected Mr. Stanfield to prepare the budget (Para. 25). Although Ms. Wells participated in its preparation, Mr. Cohen monitored its preparation and when he became dissatisfied with Mr. Stanfield's progress, Mr. Cohen himself obtained the relevant information through Mr. Fetner, a limited partner. Mr. Cohen then retyped the budget (WWOR Exh. 91) and sent it to Ms. Wells without inviting comment. (WWOR Exh. 89.) At that point in time, Mr. Cohen was in full control and command of the Garden State budget. The only input made by Stanfield was to supply general data on major market firms that was generally available in NAB research sources.

Garden State's Bank Letter

40. On September 1, 1987, Mr. Cohen contacted Sidney Fetner's son, Mr. Harold Fetner, and forwarded a draft letter that Mr. Cohen had prepared for use by a bank. The letter would be addressed to Garden State c/o Jean Wells. A copy of that letter, with enclosure, was directed by Cohen to Ms. Wells. (MM Bur. Exh. 7.) The contemplated amount of the bank loan was $25 million. The loan period would be five years at 2 points over prime with all payments deferred in the first quarter of operations. Collateral would be "all tangible assets" of Garden State. There is no provision for guarantees and no reference to financial statements.

41. Garden State introduced into evidence a copy of a letter dated October 9, 1987, that was typed on the letterhead of the Manufacturers Hanover Trust Company, and signed by a senior vice-president. (Garden State Exh. 14.) Mr. Cohen admitted that the draft that he had prepared on September 1, 1987, was similar in language to the Manufacturers Hanover letter. (Cohen, Tr. 2227-28.) In making his independent comparison of the two letters, the Presiding Judge notes that in the first paragraph where Mr. Cohen had "(name of bank)," the final letter had inserted "Manufacturers Hanover Trust Co." (*Cf.* MM Bur. Exh. 7 and Garden State Exh. 14.) The second paragraphs are substantially the same, except that the bank backed away from the unqualified introductory language requested by Mr. Cohen:

Cohen Draft: The loan will be for a period of five (5) years - - -.

Bank Letter: Our current thinking is that if we were to make such a loan, it would be for a period of five (5) years - - -.

The third paragraphs are almost exactly the same as Cohen's language. (*Id.*)

42. Ms. Wells played no role in obtaining the Hanover Trust letter. Mr. Cohen testified that it was Mr. Fetner who had obtained the letter and that Mr. Fetner's son Harold had "acted as his delegated person to handle chores and responsibilities such as this." (Cohen, Tr. 2225.) There is no evidence that Mr. Fetner, or his son Harold, had met with anyone from Hanover Trust. The letter from Mr. Cohen to Harold Fetner forwarding Cohen's draft contains no reference to another document or any contemplated meeting. (MM Bur. Exh. 7.) Cohen denied that he had obtained the letter and therefore Cohen could not have met with Hanover Trust officials. (Cohen, Tr. 2226-27.) And in opposing the addition of the financial issue in 1988, Garden State's papers did not show any meeting with bank officials or reference any business plan, budget or guarantees. From the circumstances of a letter purporting to give reasonable assurance of a $25 million loan to Garden State that contained the qualifying phrase "our current thinking" on a "if we were to make" hypothetical loan, which letter was issued without considering financing documents, such as a business plan or financial statements of Garden State principals, and without even a meeting with Garden State's general partner, or legal counsel, it appears to be a letter of accommodation. *See Albert E. Gary*, 5 F.C.C. Rcd 6235, 2637 (Review Bd 1990) (absence of firm present intent as opposed to mere willingness to consider matter in the future). It was on the basis of this hypothetical letter that Ms. Wells certified to Garden State's reasonable assurance. (Wells, Tr. 2155-56.) That letter is further evidence that Garden State never intended to construct and operate and merely prepared the minimum document to qualify for settlement.

Garden State's Use Of The Pardo Affidavit

43. Garden State also relied in part on an affidavit of Cam Pardo, WWOR-TV's business manager, dated August 29, 1988, reflecting annual lease costs of $312,995 in connection with WWOR-TV's antenna. (Garden State Exh. 15.) Pardo also noted an additional cost for new transmitter of "several hundred thousand dollars." Pardo was never contacted by Garden State. But his affidavit, which was sponsored by WWOR-TV to support its request for the added financial issue, has been adopted by Garden State to justify its budget estimate. *Cf. Memorandum Opinion and Order*, FCC 88M-3567, released October 25, 1988 at Paras. 4-6 and 11-12. In fact, Garden state once attacked the Pardo affidavit as inadequate to support WWOR-TV's theory for adding the financial issue. *Id.* at Para. 6. And since Pardo's affidavit was executed and filed in August 1988, the Garden State budget of October 1987 was already completed without Pardo's input. Garden State's failure to contact Mr. Pardo when it prepared its 1987 budget is another example of Garden State's failure to act with diligence to seek accurate and reliable costs that could impact its ability to construct and operate. But since Garden State did not even intend to construct and operate, an accurate and reliable budget was not attempted because a bank accommodation letter on a hypothetical transaction was relied upon to appear to cover whatever the costs might be. And it is noted that the transmitter costs of "several hundred thousand dollars" were never included in the Garden State budget by Stanfield in his version (WWOR Exh. 88) or by Cohen in his later revision (WWOR Exh. 91). Therefore, the failure of Garden State to contact Pardo in connection with its 1987 budget, and its failure to include Pardo's transmitter estimate, constitute additional probative evidence that Garden State used its application in an attempt to secure a settlement because it did not intend to construct and operate.

Other Evidence Of A Settlement Intent

44. The testimonial proposition that has been continuously advanced by Garden State is that there was no discussion of settlement at the dinner meeting of October 30, 1987. (Para. 20, *supra*.) Cohen testified that he never discussed settlement with Mr. Fetner and that he did not discuss settlement with Wells until January 1990 when Wells disclaimed any interest in settlement. (Cohen, Tr. 1446-47.) But WWOR-TV's litigation counsel testified in an affidavit that "there may have been off-hand references to possible settlement at various times throughout the course of this proceeding" (WWOR Exh. 92), a reasonable assumption in any piece of litigation of these dimensions.[16] And the retainer agreement drafted by Cohen provides for a 10% bonus for Cohen & Berfield if the case settles. (Cohen, Tr. 1497; WWOR Exh. 52.) Also, there is evidence that shows that challengers for renewal licenses that retained Cohen & Berfield have settled the renewal cases that they litigate with a marked degree of consistency: WYST-FM, Baltimore, MD; KHJ-TV, Los Angeles, CA; WBBM-TV, Chicago, IL.; WBNX-FM, NY; WOOK-FM, Washington, D.C. *See* Bureau's PFC, December 13, 1990, at Pp. 27-29. (*See also* Garden State Exhs. 8-9 that were received in evidence at the remand hearing as Hearing Officer Exh. A.) Therefore, the goal of settlement, once the opportunity arose, was a continuous intended result of Garden State's challenge to WWOR-TV from April 30, 1987, through September 27, 1990, when the joint petition to approve a settlement was filed in this case.

45. It is noted that in practice, the successful extraction of a favorable settlement from a financially formidable licensee such as MCA requires a resolve on the part of a challenger to litigate until the licensee makes a worthwhile offer. Therefore, Garden state had to be prepared to litigate this case with intensity for an indeterminate period of time and hope that WWOR-TV's parent, MCA, would choose to negotiate a settlement. The event triggering a settlement could occur after realizing in the course of discovery that there was adverse evidence that indicated a reasonable chance for a successful challenge or, in the case of MCA, a fortuitous event such as a formidable take-over bid. Certainly, Cohen, Fetner and Wells were aware on April 30, 1987 of the substantial resources from Fetner's share of the Mainstream settlement exceeding $1 million that could serve as an adequate "war chest." And Mr. Fetner had been primed to support the enterprise through his recent success with Mainstream.[17] Therefore, it is found that from April 30, 1987, Garden State was ready and willing to accept an appropriate settlement offer from MCA/WWOR-TV. It was just a question of when the right amount of money would be offered to Garden State.

46. The first formal settlement meeting occurred in January 1990 at the suggestion of the District Judge presiding in the U.S. District Court lawsuit in New Jersey. (Cohen, Tr. 1571.) But in that meeting there was no mention of a sum of money. (Hadl, Tr. 1100-01; Berfield, Tr. 1313-14; Cohen, 1574; WWOR Exh. 92 [Denvir Affidavit.])[18] The meeting was in keeping with a Garden State settlement strategy because Cohen reported it to Mr. Harold Fetner (the son of then deceased Mr. Fetner) and Mr. James Costigan, limited partner, and Ms. Wells. (Cohen, Tr. 1575.) Then in April 1990, WWOR-TV's lead litigation counsel, James P. Denvir ("Denvir"), met with Cohen at Denvir's request. (Berfield, Tr. 1314; Cohen, Tr. 1575-76; WWOR Exh. 92.) This meeting presented WWOR-TV the opportunity to feel out Garden State's floor for settlement. Mr. Denvir was not authorized to make an offer and he so informed Mr. Cohen. (Hadl, Tr. 1131; Berfield, Tr. 1315; Cohen, Tr. 1576; WWOR-TV 92.) Mr. Denvir asked Mr. Cohen if Garden State would settle for expenses which, at that time, amounted to approximately $450,000. (WWOR Exh. 92; Cohen, Tr. 1576-77.)[19] Mr. Cohen reported back to Ms. Wells and the limited partners who instructed Cohen that they would not settle for expenses. (Cohen, Tr. 1578.) That instruction was not against Mr. Cohen's advice. In May 1990, they met again and Mr. Cohen advised Mr. Denvir that Garden State would have to be offered in excess of $1 million to settle. (Cohen, Tr. 1578; WWOR Exh. 92.)

47. In September 1990, Mr. Hadl contacted Mr. Cohen and offered Garden State $ 1 million. (Hadl, Tr. 1135.) WWOR-TV made the first serious bid and it was then that negotiations began in earnest because MCA/WWOR-TV had reached Garden State's monetary range of settlement interest. Mr. Cohen met with Ms. Wells and Mr. Costigan and Mr. Cohen reported to Mr. Hadl that Garden State would settle for $5 million. Mr. Hadl told Mr. Cohen that he could not go above $2 million and that is the amount that Garden State accepted without any further negotia-

tion. (Hadl, Tr. 1158-59; Cohen, Tr. 1583-84.) MCA had hit Garden State's number and there was no need to negotiate further.

48. This evidence of settlement discussions, probings and negotiations from the time the case was designated for hearing and more specifically and intently between January 1990 and September 1990, establishes as a fact that Garden State had an ongoing intent to settle which intent was formulated in principle at the April 30 meeting but which did not have an opportunity to surface until January 1990 when prodded by a United States District Judge. But the subject was a continuous matter of interest. Both parties, and particularly Garden State's counsel, realized the delicacy with which it needed to be treated. Indeed, commentators on the process have portrayed the dynamics which are consistent with Garden State's settlement strategy:

> [A]n essential part of settlement - is the trial lawyer's ability to demonstrate his confidence in the outcome, his aggressiveness in attacking the other side, and his eagerness for the battle itself. There is a pervasive fear that any party making a settlement overture will be signaling a fatal weakness or lack of resolve.

Mode and Siemer, "*The Litigation Partner and the Settlement Partner*," *Litigation*, Vol. 13, No. 1 at 33-35 (1986).

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof, Standard Of Evidence, Law Of The Case Established By The Commission

49. Garden State has the burden of proving, by a preponderance of the evidence, that it has met each of the issues set forth above at Para. 9. *See Mid-Ohio Communications, Inc.*, 5 F.C.C. Rcd 4596-97 n. 3 (Comm'n 1990). Conversely, the Administrative Procedure Act requires that there be substantial evidence to support an order that would deny Garden State the right of receiving a settlement and the right of participation as a party applicant in a comparative challenge for a license. 5 U.S.C.A. §556(d). *Cf. Steadman* v. *S. E. C.*, 450 U.S. 91, 101-102, 101 S. Ct. 999 (1981) (sanction must rest on a minimum quantity of evidence), relied on by Commission in *TeleStar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987).

50. There are certain rulings of the Commission that are acknowledged to be the controlling law of the case with respect to this decision of the Presiding Judge. First, evidence cited in the *PID* to show the nature and extent of Garden State's participation in the prehearing phase of the case is insufficient as a matter of law to establish that Garden State's application "was not frivolous or intended to harass." *See MO&O* at Para. 8. Second, facts that are unique to this case establishing that Wells and Fetner had "recently participated in a substantial settlement related to the same station" must be weighed against the proposition that parties generally do not hope for or anticipate a settlement until discovery has occurred. *See MO&O* at Para. 9.[20] Third, the Commission has held that a detailed listing of the Presiding Judge's rulings on prehearing issues related to pleadings filed by Garden State "to prevent or delay discovery on the abuse of process issue itself" and therefore, such pleadings were not probative of a "conclusion that Garden State's motives in filing its application were *bona fide*." *MO&O* at Para. 8.[21]

51. Under the facts found above, the law of the case on remand, and the legal analysis made below, it is concluded that Garden State has failed to meet its burden of showing by a preponderance of the evidence that it did not file its application with an intention to achieve settlement and thereby abused the Commission's process. Garden State also has failed to show by a preponderance of the evidence that it did not lack candor when it failed to disclose to the Commission before March 4, 1991, documentary evidence that would establish the date of a significant meeting. These conclusions, based on substantial evidence of record, preclude the approval of the proposed settlement because approval of the settlement is prohibited by law and would not be in the public interest. Also, the evidence is found to disqualify Garden State as a Commission licensee, because Garden State has filed an application for the purpose of settlement and has thereby abused the Commission's process and has been lacking in candor as to the *bona fides* of its application. Also, based on substantial evidence, Garden State is found to have lacked candor in failing to disclose to the Commission the documents in the possession of Cohen & Berfield and the Fetner estate establishing the meeting of April 30, 1987.

Illegal Filing And Abuse Of Process

52. The Communications Act provides with respect to settlements of renewal cases which involve the withdrawal of an application in exchange for the payment of money:

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; *and* (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

47 U.S.C.A. §311(d)(3). (Emphasis added.) The Commission has authorized presiding administrative law judges to consider requests for abuse of process issues in individual cases which would be "preserved for Commission review." *WWOR-TV, Inc.*, 5 F.C.C. Rcd at 2846. And the Commission also stated its expectation that its decision-making personnel apply changing Commission policy in pending cases. *Id.* at Para. 9.

53. Garden State's argument that there is an absence of Commission precedent for rejecting the settlement and for dismissing the case without a full comparative hearing has no merit. Where the Commission breaks new ground in administrative adjudication, it need only provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston TV Corp.* v. *F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970). The Commission has met that standard in its Rule Making on abusive settlements in renewal proceedings. *See Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742*, 3 F.C.C. Rcd 5179 (1988); and *First Report and Order in BC Docket No. 81-742*, 4 F.C.C. Rcd 4780 (1989). Therefore, the Commission may apply its policy to the facts of this case and cases granting settlement are inapposite because of the Commission's new policy and the unique facts of this case.

54. But aside from enforcing the Commission's new policy, the proposed settlement should not be approved under the clear legislative intent of the Act which predated the Commission's policy. Garden State urges a restrictive reading of the statute, citing legislative history that indicates a congressional intent to prevent the filing of "frivolous applications" in order to "harass an incumbent." *House Conference Report* No. 97-208, July 29, 1981, Radio Reg. 2d (P&F) at pages 10:605, 10:608. Garden State argues that this is a "narrow standard" that was intended only to reach "egregious abuses." Garden State PFC, December 13, 1990, at, 12-13. But the principles of statutory construction start with the statute's language which, if clear, renders any construction unnecessary. *See United States* v. *Scrimgeour*, 636 F.2d 1019, 1022-24 (5th Cir. 1981). The plain meaning of §311(d)(3) covers the self-evident cases[22] as well as those, such as here, that require a more extensive development of an evidentiary record. The issue was framed to include the abuse of process and lack of candor that are subsumed in a finding that a party has filed an application for the purpose of settlement. *See* Para. 6, *supra*. From the above factual analysis, it is concluded that Garden State's acts and testimony would constitute an "egregious abuse" that was intended to "harass" MCA/WWOR-TV.

55. The Mainstream settlement and the disbursement of $5.37 million on April 7, 1987, is probative of a disposition that existed on the part of Cohen, Fetner and Wells on April 30, 1987, to form an intention to file against WWOR-TV's renewal application for the purpose of settlement. Cohen testified that on Fetner's instructions he (Cohen) was on the lookout for another speculative broadcast venture so that Fetner could return to the "chase." Cohen also had occasion to be speaking with Wells in April 1987 about the Poughkeepsie application, in which she has been found to be an active player, and Cohen quickly put Wells back in touch with Fetner who had known Wells in Mainstream and therefore he knew that Wells could serve as a general partner who would settle.

56. The meeting which we now know took place on April 30, 1987, was held in order to agree on the venture. All three went to the meeting on April 30 with the fact of the successful and highly lucrative Mainstream settlement in mind and it was not necessary to say the word "settlement." *See PID* at Para. 56 (the prior experience of Mainstream made it unnecessary to affirmatively mention settlement). This conclusion that settlement was Garden State's intended objective on April 30, 1987, is reached by weighing the circumstantial evidence against Cohen's only unqualified, lucid recollection of a significant fact, i.e., that the word "settlement" was never mentioned. Wells had not reached any determination on the merits of WWOR-TV's local New Jersey broadcasting because she admitted that two weeks time would be insufficient, she had not spoken with Dr. Johnson, the local programming expert, she recalled that she was focused on programming in the Summer and not in the Spring, and she could not even recall one program that gave concern about local programming. On remand, Garden State's story has been refined to state that Wells merely observed that there had been no change to RKO's programming. But Wells knew two facts in April 1987: that the Commission had found no problem with RKO's local programming that would raise a substantial question of fact[23] and that WWOR-TV could not be expected to finalize major local programming changes in the first month of operations after an assignment from a major broadcaster. In fact, Wells could not even recall one program to rely upon to support her story. When she met with Cohen and Fetner on April 30, she had no reasonable basis to conclude that local WWOR-TV programming was inadequate. And Mr. Cohen's testimony of "many, many, many" questions about programming is rejected.

57. The Garden State account shows further direct evidence of a fabrication. Cohen testified that in April 1987, Wells told him about the impending renewal date and informed him on procedures for WWOR-TV's license renewal. Wells testified, to the contrary, that Cohen had told her of the renewal date and procedures in the Summer of 1987. (*See* supra.) Cohen has a history of representing challengers to renewal applications and it is accepted that he has considerable expertise as a practitioner in how to apply renewal procedures in order to achieve a settlement. Ms. Wells has not demonstrated any similar proficiency. Therefore, Ms. Wells is believed and Mr. Cohen's account is rejected as an incredible factual event. As for the element of intent, Garden State had a motive to have Wells appear as the April activist because that role was consistent with Garden State's initial portrayal of Ms. Wells' being intently concerned about local programming which, if believed, would indicate a public interest motive in the challenge rather than an intent to become enriched through a follow-up settlement. And the more passive Cohen is made to appear before the April 30 meeting the more credible becomes the denial of Garden State of having filed its application for a settlement, or at least the more clouded becomes the evidence which works in favor of Garden State.

Significance Of Newly Disclosed Evidence

58. Prior to receiving the remand documentary evidence that establishes clearly and convincingly that the meeting occurred on April 30, 1987, the earlier record evidence showed a sliding date as late as July 1987, three months later. As a result of that intentionally planted misconception, it was found in the *PID*:

> These circumstances leave open the question of when Ms. Wells had the opportunity to review programming before Mr. Cohen relayed her concern to Mr. Fetner, the person who apparently was interested after his success with Mainstream to return to the "chase."

See PID at Para. 51. Now, on remand, with new evidence having compressed the time between the Mainstream payouts on April 7 to the meeting on April 30, the motive of Wells' program review collapses, along with Cohen's image of transmitting messages between Wells and Fetner. Now the motive for deciding on April 30 to file a challenging application can reasonably be inferred from the circumstances to be to extract a settlement from MCA/WWOR-TV.

Garden State's Budget Is Unreliable

59. There also was post April 30 evidence to corroborate a settlement motive. WWOR-TV's parent company, MCA, had purchased the station from RKO in 1987 for over $300 million. The station was and is a valuable asset

which would justify expending substantial amounts of money by any challenger that was serious about becoming an owner-operator. Yet, on remand it was determined that Cohen had arranged for only a genericly formulated financial estimate from Mr. Stanfield, a former business collaborator and client. Stanfield was paid a fee of $5,000 for his work on a budget that was based almost exclusively on pre-published data for west coast broadcasting properties, and in which Stanfield did not demonstrate much of an interest in preparing. Cohen ultimately assumed control over the budget's preparation and dealt through Fetner to obtain twice removed hearsay concerning the antenna cost. Cohen sent the data directly to Stanfield, by-passing Wells, who in turn reported directly to Cohen. When Stanfield forgot to include the $1.2 million cost estimate, Cohen prepared the document himself and sent it back to Stanfield, with an information copy to Wells. But neither Stanfield nor Cohen took into account the cost of a new transmitter that was in Pardo's affidavit and there was not even one mention made in the document as drafted by Stanfield or as redrafted by Cohen to the name "Garden State." There was estimated data collected by Wells on studio rental costs and mobile units. But her role was essentially clerical based on the substance of the testimony and her remoteness to the final document.

60. The Sagner information on antenna costs was obtained in a highly casual manner. The ultimate source is unknown, and its reliability is therefore highly questionable. Fetner obtained the $1.2 million estimate from a retired Chairman of the Port Authority who Fetner met once on an international flight and whose deposition testimony (Garden State Exh. 16) shows that he had no interest in securing the data for Fetner and could not recall the cost figure that he had obtained. There is no evidence of record on the ultimate source of the data and Mr. Sagner's deposition is strewn with hedged answers and inabilities to recall. Thus, there is evidence now in the record to conclude that the Fetner-Sagner data was unreliable and Cohen took no steps to assure its reliability when he included it in the budget, or when Garden State put on its case in the remand proceeding. It is concluded that the Garden State budget and the Hanover Trust's carefully hedged "commitment letter" would provide no reasonable basis for Wells to certify. Furthermore, the cavalier manner in which budget and financing were handled is another fact circumstance probative of an intent of Garden State to file for a settlement.

The "Lost" Mainstream Budget

61. Logically, Stanfield, Cohen and Wells would have begun their budget preparation with the Mainstream budget that the three allegedly had prepared about 18 months earlier. But there never was a written Mainstream budget that was used or that was available for use in August 1987, or at anytime. Stanfield had absolutely no recollection of any substantial input for a Mainstream budget and neither Cohen nor Wells could supplement Stanfield's inabilities to recall. The absence of a Mainstream written budget and the uninformed testimony of Stanfield, Cohen and Wells that Mainstream's data was never considered in the August 1987 meeting on Garden State's budget supports the conclusion that there never was a formal budget for the Mainstream enterprise. While there may have been discussions between Cohen and Stanfield about Mainstream at the time Mainstream was filed, it would be unreasonable to conclude that a budget ever existed. This conclusion is reached from the uniform inabilities of three witnesses to recall even one significant fact about the Mainstream budget and from an intrinsic inconsistency in the evidence. In that latter connection, it is noted particularly that August 1987 was the first time that Stanfield had called for financial data on antenna costs for Channel 9 and costs of a New Jersey news office and studio rental. Since that information was never sourced for Mainstream there never was a Mainstream budget. Yet Stanfield, Cohen and Wells continued to seek to convince the fact finders of its existence through conclusory testimony. While not one of the three could recall anything specific about Mainstream's budget, each concluded that Mainstream data or methodology for the same station was never mentioned in August 1987, much less considered. If Wells and Cohen were so cavalier with Mainstream's budget it is reasonably inferred that a similar cavalier attitude on the part of Garden State existed about its budget, which inference tends to further support a finding that Garden State filed to settle.[24]

The Burden Of Proof Is Not Met With Incredible Testimony

62. Garden State's initial attempts in the hearings of October 1990, to wrongfully portray Ms. Well's interest in local broadcasting as the primary motive for the decision of Cohen, Fetner and Wells to organize a challenging venture included testimony that is relied on by Garden State and that is lacking in candor. The testimony of Mr. Cohen and Ms. Wells were intentionally presented without available documents and with inabilities to recall so that the date of the meeting would remain an indeterminate one. For the definitive documents were permitted to lay fallow in the office records of the Cohen & Berfield law firm. There was a recognized motive to keep them out of this record because the establishment of a firm date of April 30 was against Garden State's interest. In view of its candorless character, the testimony of Cohen and Wells does not constitute the credible evidence that is necessary to carry Garden State's burden of proof. Therefore, in addition to concluding from the evidence of record discussed above that Garden State had an intent to file its application to secure a settlement, the settlement will not be approved because Garden State has failed to sustain its burden of proof on the added lack of candor issues.

63. The evidence of an existing intent to mislead the Presiding Judge and the Commission is contained in Cohen's own testimony and a brazen post-hearing argument made by Garden State to the Commission in a request for reconsideration. For Mr. Cohen came to the first hearing with a clear understanding that inquiry would be made about the date of the Cohen-Wells-Fetner meeting. He testified on October 24, 1990, that he had "looked for whether [he] had a diary entry as to when [he] met with Mr. Fetner and Jean Wells" in connection with preparing his testimony. (Cohen, Tr. 1437.)

Mr. Cohen:	I looked and it's not there [in his diary].
Judge:	Yes, that's what I'm saying you have done in terms of your preparation.

Mr. Cohen: Yes, because I thought that I should be able to tell you. *It seemed to me you'd want to know the dates and I wanted to be able to give them to you.*

Judge: So you anticipated this?

Mr. Cohen: Yes, sir.

(Cohen, Tr. 1437.) (Emphasis added.)

64. Mr. Cohen was working with at least two experienced trial attorneys in his preparation, one of whom is a member of the Cohen & Berfield law firm, and Mr. Cohen and Mr. Boyce are familiar with the firm's recording-keeping practices. How simple it would have been for anyone anticipating the question to check client expense records and reconstruct from an airline ticket that would be booked against the Garden State account. Yet as long as no one asked for airline and restaurant receipts, that information was not going be volunteered by Garden State at the trial level of the case. But Garden State realized that its ploy lost when the Commission released its remand ruling on March 4, 1991, for it knew from the Bureau's PFC that the Bureau would be specifically asking for business documents on the remand. Yet consider the concerns raised before then. Certainly Mr. Cohen, with years of experience as a communications counselor, knows full well that the Commission's first-line fact finder is the presiding officer. He also understands the role of Bureau counsel as the advocate representing the public interest in the creation of a true and accurate hearing record. In proposed findings filed on December 13, 1990, the Bureau expressed its concern with the absence of proof on when Wells began reviewing programming, when she communicated her adverse conclusions to Cohen, and the date of the meeting. *PID* at Para. 51. The Bureau specifically argued that "the credibility of Wells' claim is directly related to the extent she had an opportunity to evaluate that programming [and] [e]qually significant is the fact that evidence establishing the date has not been produced by Garden State." *See* Bureau PFC filed December 13, 1990 at 31.

65. This unqualified statement by Bureau counsel rested in the hands of Garden State's team of trial lawyers until Garden State filed its Reply pleading on December 20, 1990. So between December 13 and December 20, Garden State's counsel had two concerns: Mr. Cohen's stated desire under oath to give the correct dates to the Presiding Judge (Cohen, Tr. 1437), and the Bureau's uncategorical arguments quoted above that were communicated to Garden State in the Bureau's PFC. Yet Garden State did not file a motion to reopen the record to report that documents existed that would categorically establish the date of the April 30 meeting. Instead, Garden State chose to make light of the Bureau's concerns by referring to:

> [t]he Bureau's principal quibble [that] related to the inability to recall the precise date of discussions that occurred almost four years ago that resulted in the formation of Garden State.

See Garden State RPFC filed December 20, 1990, at 2. Thereafter, in his ruling released on January 11, 1991, the Presiding Judge acknowledged the Bureau's concern and specifically rejected Garden State's "quibble" characterization on a "material circumstance." *PID* at Para. 55. In fact, the Presiding Judge stated that he wanted to see the date of the meeting, and the date of the preceding Cohen-Wells conversations on programming, "resolved with the precision of clear and convincing evidence." While the clear and convincing evidence standard is not required and substantial reliable evidence would be adequate, it was hoped that the best quality of evidence possible could have been presented on which a decision could be rendered. *PID* at Para. 55. Certainly, as analyzed above and in the *PID* and in the *MO&O*, the testimony of Ms. Wells and Mr. Cohen did not constitute substantial evidence in support of Garden State's burden of proof.

66. As indicated by the disclosure of the documents of the April 30 meeting from Cohen & Berfield files in March 1991, and the document obtained from Mr. Fetner's estate files after his widow had testified on remand, such evidence as expressly desired by the Presiding Judge and Bureau counsel was at all times in existence. But it would never have been produced had not the Commission acted *sua sponte* to pick up on these concerns about dates and send the case back for the receipt of additional evidence. Garden State was seeking to convince that Jean Wells was concerned about programming and had reached a conclusion that a poor record of local programming by a two-week old WWOR-TV would be challenged so that Jean Wells could change the programming for the benefit of northern New Jersey. Garden State knew it had a credibility problem from the Bureau's briefs and the Presiding Judge's *PID*. Nonetheless, it thought that the story would not be broken once the settlement was initially approved. But when the Commission remanded, Garden State realized it had a serious credibility problem and within six days between March 4, 1991 and March 11, 1991 (Tr. 1908-09), Garden State produced some highly reliable documentary evidence that had at all times been in the custody and control of its counsel. Thus, the motive to keep the documents from ever seeing the light of day was a $2 million settlement that would be paid to Garden State if nothing happened to cause the Commission to call for additional evidence. The last thing that Garden State would want to happen would be the disclosure, during the interim 50 day waiting period, of documents that would address the concerns of the Bureau and the Presiding Judge and establish the date at April 30, 1987.

67. After disclosure of the documents at the prehearing conference of March 12, 1991, Garden State shifted its tactics and its assessment of the record. Tactically, the proximate causes for the missing evidence became, in Garden State's view, the Bureau's counsel and the Presiding Judge for their failures to ask the precise questions. Then on March 29, 1991, in a request to the Commission for reconsideration, Garden State disclosed that it had probative evidence but justified its failure to produce at an earlier time on the fact that while the Presiding Judge wanted "other evidence" that would "pin down the date," he had accepted the testimony as credible. *See* Petition For Reconsideration at 5-6. That representation leads to the conclusion that Garden State believed that so as long as the Judge had been led to believe that the best evidence available was its uncertain testimony, Garden State did not have any obligation to produce more precise documentary evidence that was in its counsel's possession. In that same pleading, Garden State acknowledged that the Bureau had suggested in its proposed findings filed on

December 13, 1990, that "the date might be subject to verification from business receipts generated by the event." To that point Garden State rejoins:

> The record, at that point, however, was closed. Neither the Bureau nor any other party had focused on this possibility during discovery or at the hearing. *Garden State did not recognize at that juncture the significance that has now been given to this matter*; however, a search was made promptly after the release of the *MO&O*.

See Petition For Reconsideration, filed March 29, 1991, at 6 n. 2. (Emphasis added.) The quoted representation that Garden State did not recognize the significance of date certain business documents until the Commission released the *MO&O* on March 4, 1991, is rejected as unbelievable in view of the experience of Garden State's counsel in Commission proceedings and the clear statement by the Bureau made in a pleading almost three months earlier. A retrieval was made promptly after release of the *MO&O* because Cohen & Berfield had reason to believe the documents could be located and the Bureau would soon be requesting their production. Garden State had merely ignored the concerns of the Presiding Judge and Bureau counsel and would have done nothing more but for the Commission's equal concern stated in the *MO&O*. By leaving the record pending before the Commission for almost three months in the face of the stated concerns for documentary evidence, Garden State intentionally lacked candor before the Commission. *See Silver Star Communications-Albany, Inc.*, 3 F.C.C. Rcd 6342, 6349 (Review Bd 1988) (lack of candor of an applicant can arise from not being fully forthcoming even when the information is not elicited). Nor may Garden State rely on this development as a trial tactic of counsel that is not attributable to Garden State. *See Mark A. Perry*, 4 F.C.C. Rcd 6500 (Review Bd 1989) (acts and non-acts of counsel do not excuse an applicant's failure to comply with FCC requirements). Therefore, Garden State is not qualified to receive a Commission license as a result of its intentional failure to advise the Commission before the time for *sua sponte* Commission review expired, through motion to reopen record, or otherwise, that there were business documents available that would establish the date of April 30, 1987, as the date of the Cohen-Wells-Fetner meeting.

68. Garden State's latest fall-back position would seek to avoid any liability for its lack of candor. On May 17, 1991, Garden State argued:

> In any event, *any lack of candor that might be found is irrelevant to the underlying issue* of whether the settlement should be approved. The *MO&O* makes clear at para. 11 and n. 20 that no change was intended in Commission policy that qualifying issues need not be resolved in order to approve a settlement. The sole issue that must be addressed is whether Garden State filed an application in December, 1987 for the purpose of settlement. *Whether Garden State also committed a lack of candor three years later is essentially irrelevant and would provide no basis for disapproving the settlement even if resolved adversely.*

See Garden State's PFC filed May 17, 1991 at 20. (Emphasis added.) That might arguably be an outcome if the lack of candor related to something other than filing for settlement. But the hearing on settlement had been set by the Presiding Judge to consider an issue set to determine whether §311(d)(3) has been violated. The public interest standard expressly contained in that statute precludes approving any settlement that involved a lack of candor subsumed in filing an application for the purpose of settlement. Also, there was a later compounded lack of candor directly perpetrated before the same Commission being asked to approve the settlement that involved withholding pre-existing documentary evidence that is relevant to the issue of whether the application was filed to secure a settlement. But even if lack of candor occurred at the time of filing or three or more years after the application had been filed, the relationship of these lacks of candor to the proposed settlement preclude approval of the settlement on grounds of public interest.

Ultimate Conclusions of Law

69. Garden State has failed to meet its burdens of proof to establish by a preponderance of the credible evidence that it did not file its application for the purpose of reaching an agreement; that the filing of its application did not abuse the Commission's process; and that it did not misrepresent or lack candor in connection with the representation in its application that it did not file its application from an improper motive and with a lack of good faith.

70. There is substantial and reliable evidence in the record that establishes that on April 30, 1987, twenty three days after disbursement of $5.27 million from the Mainstream settlement, Cohen, Wells, and Fetner met and agreed to file an application against WWOR-TV's renewal for the purpose of reaching an agreement to dismiss Garden State's application in return for the payment of a substantial sum of money to be determined at an unknown date through negotiation.

71. Garden State has failed to meet its burden of proof to establish by a preponderance of the evidence that it did not lack candor before the Commission in its failure to produce the evidence of dinner receipts for April 20, 1987, that were in the possession of the Cohen & Berfield law firm and in the papers of the estate of Sidney Fetner and an airline ticket of its communications counsel, Lewis I. Cohen, while the case was pending for review before the Commission.

72. There is substantial and reliable evidence in the record which establishes that between December 13, 1990, and March 3, 1991, Garden State lacked candor before the Commission in failing to seek to reopen the record, or to otherwise disclose documents in the form of dinner receipts of April 30, 1987, and an airline ticket of its counsel, Lewis I. Cohen, that establish a meeting of Cohen, Wells and Fetner on that date.

73. As a result of the filing of Garden State's application for the purpose of reaching an agreement with WWOR-TV and the abuse of process and absence of candor incident to that filing, and/or as a result of Garden State's lack of candor to the Commission in connection with the hearings on the proposed settlement, Garden State is not entitled to receive a money payment in connection with a settlement in this case, and Garden State is disqualified from receiving a Commission license.

74. It is found that Garden State Broadcasting Limited Partnership is not qualified to participate in a monetary settlement in this case in return for the dismissal with prejudice of its application because the applicant has filed its application to secure a settlement, has abused the Commission's processes, and has lacked candor before the Commission.

75. It is further found that the Form 301, as amended, that was filed by Garden State Broadcasting Limited Partnership on December 23, 1987, was not a *bona fide* application now, or when it was filed, and that the Commission's processes were abused by Garden State Broadcasting Limited Partnership, and that Garden State Broadcasting Limited Partnership has misrepresented or lacked candor in certifying to the Commission that it did not file its application for an improper motive or with any lack of good faith.

76. It is further found that from October 19, 1990 to March 29, 1991, Garden State intentionally lacked candor before the Commission in failing to disclose material documents in the possession of the law firm of Cohen & Berfield, P.C. and in the files of the estate of Sidney Fetner that establish the date of the meeting of Mr. Cohen, Ms. Wells and Mr. Fetner on April 30, 1987, that being the meeting at which the three decided to file an application for the purpose of securing a settlement.

ORDER

IT IS ORDERED that the Joint Request For Approval Of Settlement Agreement filed on September 27, 1990, by WWOR-TV, Inc., Garden State Broadcasting Limited Partnership IS DENIED.

IT IS FURTHER ORDERED that the application of Garden State Broadcasting Limited Partership (File No. BPCT-871223KG) IS DENIED and DISMISSED WITH PREJUDICE, and the application for renewal of license of Station WWOR-TV, Secaucus, New Jersey (File No. BRCT-871221KE) IS GRANTED.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[25]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] The same abbreviations will be used here: WWOR-TV, Inc. ("WWOR-TV"), Garden State Broadcasting Limited Partnership ("Garden State"), and Mass Media Bureau ("Bureau"). The persons involved with the Garden State applications were Ms. Jean Wells, general partner, Mr. Lewis I. Cohen, counsel and promoter, and Mr. Harold Fetner (deceased), a limited partner and promoter. At times, there are references to Proposed Findings and Conclusions as "PFC."

[2] The Presiding Judge had accepted a settlement under the *PID* which would have resulted in the dismissal of Garden State's application in return for a payoff from WWOR-TV in the amount of $2 million. The initial decision to accept the settlement was made because the evidence was found to fail to establish that Garden State had filed its application for the purpose of receiving a settlement. *See* PID at Para. 49. The Commission accepted the conclusion that the evidence of record developed in the hearing held in October, 1990, "does not conclusively establish that Garden State abused the Commission's process by filing its application for the purpose of settlement." *MO&O* at Para. 7. But the Commission held in that same ruling that it was not persuaded by conclusions reached by the Presiding Judge in support of accepting the settlement "given the limited scope of the current record." *Id.* The additional factors noted by the Commission were the subject of the remand hearing and this *Initial Decision*. *See MO&O* at Paras. 8-11.

[3] *Cf. Memorandum Opinion and Order in BC Docket No. 81-742*, 5 F.C.C. Rcd 3902 (1990).

[4] WWOR-TV has consistently pressed for an early resolution of the settlement/abuse of process issue. Therefore, WWOR-TV was expected to waive its work product protection for relevant documents that would assist the Bureau. In addition, given the Commission's mandate for expedition, there was found to be a substantial need for work product discovery by the Bureau and counsel for WWOR-TV was instructed to seek waiver of attorney-client privilege from WWOR-TV of relevant evidence. *Id.* at fn. 1.

[5] Mr. Fetner, a promoter and limited partner of the Garden State venture and a person who had contacted a former official of the New York Port Authority about antenna costs, died in 1988. His widow had attended the meeting in New York that was the subject of the remand and so Mrs. Fetner was sought as a witness by Bureau Counsel. She was produced by Garden State for her testimony on April 22, 1991, without the need for a subpoena. She provided sworn written testimony in advance of her appearance. (Garden State Exh. 10.)

[6] As noted above, the *MO&O* was a remand directive from the Commission to the Presiding Judge and the parties in which the Commission directed the adduction of further evidence in specified areas of concern. It was a classical interlocutory order from which reconsideration is not authorized under the Commission's rules. 47 C.F.R. §1.106(a)(1). Since there is no issue pending before the Commission this proceeding would not be stayed by Garden State's pleading to the Commission.

[7] The record was held open for the limited purposes of allowing for contingencies of recalling witnesses based on an ongoing search for documentary evidence through Mr. Fetner's estate representatives. For all other purposes the record was closed at the conclusion of the hearing, April 22, 1991. *Id.* at fn. 1.

[8] The Commission upheld Garden States' dismissal as an appropriate remedy:

> We note that in discussions held during the prehearing conference, the ALJ indicated that if, at the close of the proceeding, he determined that Garden State had abused the Commission's process by filing an application for the purpose of settlement, he may consider issuing a ruling that Garden State lacks the requisite qualifications to be a Commission licensee and would deny Garden State's application outright without further hearing. The parties disputed whether such a ruling would be procedurally appropriate. Transcript at pages 957-976. In the event that the ALJ determines that Garden State filed its application for the purpose of settlement, thereby abusing the Commission's processes, we agree with the ALJ that due to the special circumstances presented by a finding of abuse of process, no useful purpose would be served by requir-

ing further hearings in this case and that denial of the application would be proper. *See RKO General, Inc.*, 61 F.C.C. 2d 1062, 1064 (1976).

MO&O at 7 n. 21. The same rationale will be applied as the law of the case to the added issues on Garden State's candor.

[9] In that case, the Commission has recently found that Mr. Cohen had organized the Poughkeepsie venture and that Ms. Wells, who was held out as being only a limited partner, had recruited the general partner. *See Poughkeepsie Broadcasting Limited, et al.*, 6 F.C.C. Rcd 2497, FCC 91-139, released May 9, 1991. The Commission also found the Cohen/Wells proposal in that case to be "not reliable" and therefore, no integration credit was allowed by the Commission for their proposal. *Id.* at Para. 6. While the Commission findings in Poughkeepsie do not constitute direct evidence of a wrongful intent in this case, that finding by the Commission is probative of Cohen's and Wells' capacity to form a *mens rea* to deceive the Commission in a broadcast application. That demonstrated capacity of *mens rea* supports the finding of wrongful intent in connection with filing an application in this proceeding for the purpose of securing a settlement and thereby abusing the Commission's process.

[10] Garden State elected to file its application on December 23, 1987, two days after WWOR-TV's renewal application at the front of a three month window. *See Memorandum Opinion and Order*, FCC 88M-3358, released October 11, 1988.

[11] *See e.g.*, Fn. 13, 14, 19 *infra*, and Para. 38, *infra*.

[12] Stanfield later testified that the meeting was in his new office which would mean late August or early September 1987. (Stanfield, Tr. 2110.) But it took several series of questions for Stanfield to state an assured answer: Stanfield stated the subject never arose and he never asked Cohen or Wells for a copy of the Mainstream budget or for an oral recounting of its contents.

[13] Mr. Cohen's testimony on who selected and arranged for Mr. Stanfield is unclear. Cohen testified that he could not recall whether Wells asked Cohen for a suggestion or whether Wells herself suggested using Stanfield (Tr. 2210). Wells testified that Stanfield was recommended by Cohen (Tr. 2182). Stanfield testified that he was contacted by Cohen and that it was Cohen who told Stanfield that he wanted Stanfield to prepare a budget (Tr. 2105). The weight of the credible evidence supports the finding that Cohen arranged for the Stanfield budget meeting and that Cohen selected Stanfield.

[14] Bureau Counsel's question and Mr. Cohen's answer were followed by an untimely objection to the question about sequence of events from Garden State's counsel. He stated as grounds that documents showing the sequence of dates (WWOR Exhs. 88, 89) were in the record and that there should be no reliance placed on Mr. Cohen's inability to recollect "something that happened so long ago" (Tr. 2219). The question had already been asked and answered and the objection was overruled. Counsel for Garden State was cautioned by the Presiding Judge to not suggest to a witness that the witness could not recall an event because of the passage of time (Tr. 2219). Garden State's counsel then asked for, and was granted, a brief bench conference at which he stated outside the presence of Mr. Cohen that he did not consider the sequence of dates to be a "sensitive area" (Tr. 2220). Bureau Counsel rejoined by referring to Mr. Stanfield's testimony wherein he had indicated that he had received the cost item before he had furnished the budget and he had inadvertently excluded a cost item that he had in his possession when he prepared the budget (Tr. 2220). Mr. Stanfield's testimony appears at Tr. 2130. *See Para.* 30 above. The "non-sensitive area" argument was rejected and before Mr. Cohen returned to the courtroom, counsel for Garden State was again cautioned by the Presiding Judge against even inadvertently suggesting to the witness that he not recall (Tr. 2221). It is again noted that the Commission's remand was prompted by "repeated significant memory lapses" of Garden State's witnesses. *MO&O*, *supra* at Para. 8. In the earlier hearing, Mr. Cohen did not consider the significance that would be given by the Commission to the date of the dinner meeting. (Garden State Exh. 12 at 2.) On the date of the remand hearing, his counsel did not consider the sequence of events relating to the budget's preparation and completion to be a sensitive area. This continuing cavalier attitude towards the process for determining whether Garden State filed for purposes of settlement requires a lengthly examination of the record in this decision in order to determine when Garden State witnesses recognize the significance of the events concerning which they are being questioned.

[15] Ms. Wells had testified that she had furnished Mr. Stanfield with information on real estate costs. (Wells, Tr. 2152-54.) But there is no evidence that it was transmitted to Stanfield in writing. And if it were produced on discovery, it could have been included in the WWOR exhibits or as a Garden State exhibit.

[16] It is noted that in addition to this proceeding at the Commission, the parties are engaged in a civil lawsuit in a U.S. District Court in New Jersey. *See PID* at Para. 61. In addition, in the course of this proceeding, Garden State had challenged the Presiding Judge for bias and prejudice and has appealed to the Commission to protect evidence from disclosure under the attorney-client privilege. Such tactical uses of appellate rights indicate an ability on the part of Garden State to use Commission procedures to defer final litigation on the merits of the challenge in order to facilitate a pre-hearing settlement.

[17] Mr. Fetner initially had intended to be the sole limited partner at the outset. But he later selected 9 other limited partners who would contribute capital to the venture. (Cohen, Tr. 1440, 1452; WWOR Exh. 45 at 3.)

[18] It is a commonly recognized principle of negotiations that it is generally more advantageous to have the opponent bid first on a settlement amount, for that amount then becomes the opponent's floor or ceiling and the non-bidding party can only improve her or his position. Therefore, Cohen as prospective recipient of a cash buyout would not be expected to bid first, even though Garden State may have been primed for a settlement for the right amount of money at any opportunity.

[19] Mr. Cohen was questioned repeatedly in his examination in order to yield his testimony on the amount:

Mr. Sarosdy:	Did you describe to him how much the expenses were?
Mr. Cohen:	He knew. Jim Denvir knows more about Garden State than I do.
Judge:	I am not sure if that really is very responsive.
Mr. Cohen:	He knew exactly, Your Honor.
Mr. Sarosdy:	Was there a number that was mentioned?

Mr. Cohen:	No, but he knew. The point, Your Honor, was he knew. - - - He knew exactly how much money had been expended, so there was no necessity to put a number on the table. ----
Mr. Sarosdy:	Well, how much was it?
Judge:	So that was subsumed?
Mr. Cohen:	Exactly, sir, right. I knew he knew, and he knew I knew he knew. How much was the number, you just mentioned it five minutes ago. It was, what, $450,000.

(Cohen, Tr. 1556-57.) *Cf.* Garden State's criticisms of the Presiding Judge's active role in questioning a WWOR-TV witness on his perception of Garden State's motive in filing its application, noting that WWOR-TV had sought the issue. (Garden State's Proposed Findings of Fact and Conclusions of Law, filed on December 13, 1990, at Pp. 28-30.) *Cf.* Garden State's criticism of Presiding Judge's warning to Mr. Cohen in connection with his inability to recollect. (Garden State's Proposed Findings of Fact and Conclusions of Law, filed on December 13, 1990, at Pp. 30-31.)

[20] It is noted that the Federal Communications Bar Association has recently represented to the Commission that "discovery is often necessary for the parties to make a comparative assessment of the applications and determine whether a settlement is worth while." *Proposals to Reform the Commission's Comparative Hearing Process To Expedite the Resolution of Cases*, FCC 91-154, released May 15, 1991, at Para. 5. The Commission also recognizes that "discovery often aids the settlement process." *Id.* at Para. 6. But those observations do not mean that there can be no evidence of an applicant filing for settlement before there has been discovery. *Cf. MO&O*, *supra* at Para. 9.

[21] The reference made by Garden State in its Petition For Reconsideration filed on March 29, 1991, at pages 7-8, to the Commission's earlier ruling denying Garden State's request to disqualify the Presiding Judge for his decision in adding the abuse of process issue is inapposite to this more recent Commission ruling in the remand *MO&O*. There the Commission had merely rejected the Presiding Judge's suggestion made in his ruling of September 27, 1989, that Garden State appeared to be seeking delay by its follow-up with a second disqualifying request after Whitley's first disqualification request had been denied. *See WWOR-TV, Inc.*, 5 F.C.C. Rcd 2845, 2847 (Comm'n 1990). But the tactical use of procedures to delay discovery of the abuse of process/settlement issue is probative of an intent to file and litigate to secure a settlement. *See MO&O* at Para. 8.

[22] *Cf. Albert E. Gary*, 4 F.C.C. Rcd 4112 (Review Bd 1989) (in which an applicant was dismissed without receiving any compensation who, while hoping to settle, had failed to follow procedural rules and orders resulting in dismissal).

[23] *See RKO General, Inc., supra* at 1088:

> [RKO's] [p]ublic affairs programming similarly shows a regular flow of programs that treat New Jersey issues [fn. omitted]. Public service announcements and editorials also deal with New Jersey issues and concerns [fn. omitted].

[24] Garden State has made the argument that the Mainstream settlement involved an appeal from an order rejecting an application and it was not the settlement of a timely filed application. Mr. Cohen and Ms. Wells do not believe that the same legal criteria applies. *See* Garden State RPFC filed on December 20, 1990, at page 3. Thus, Mainstream did not take the budget process seriously since Cohen was giving legal advice that there were different standards applied to Mainstream which was seeking to block an assignment from the standards that are applied to a Garden State application that the Commission accepted for filing. But certainly the financial certification in both instances must be truthful.

[25] This Initial Decision disposes of this case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-649

In the Matter of

Amendment of Section 73.606(b), RM-7563
Table of Allotments,
Television Broadcast Stations.
(Roseburg, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 25, 1991; Released: July 16, 1991

By the Chief, Allocations Branch:

1. At the request of KMTR, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 153 (1991), proposing the allotment of Channel 46 to Roseburg, Oregon, as the community's third local commercial television allotment. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, petitioner is one of two applicants for Channel 36 at Roseburg, and the allotment of Channel 46 would accommodate both applicants' desire for a channel in Roseburg and avoid a comparative hearing. Therefore, the *Notice* also proposed to permit petitioner to amend its application to specify Channel 46 and retain its cut-off protection if there were no other expressions of interest in the allotment or if there was an additional television channel available for use by such parties.

3. We believe the public interest would be served by allotting Channel 46 to Roseburg, Oregon, since it could provide the community with an additional local commercial television service. Channel 46 can be allotted to Roseburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.5 kilometers (10.3 miles) south to avoid the Portland "freeze" area.[1] *See Order*, 52 FR 28346, July 29, 1987. In light of the fact that no other party expressed an interest in use of Channel 46 at Roseburg, we will also permit petitioner to modify its application (BPH-900413KH) to specify Channel 46 and retain its cut-off protection. *See Copeland, Kansas*, 5 FCC Rcd 7682 (1990).

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 30, 1991,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Roseburg, Oregon	4+, 36, 46+

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 46 at Roseburg are North Latitude 43-04-15 and West Longitude 123-23-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-211

In the Matter of

Amendment of Section 73.202(b), RM-7548
Table of Allotments,
FM Broadcast Stations.
(Tallulah, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 25, 1991; Released: July 16, 1991

Comment Date: September 6, 1991
Reply Comment Date: September 23, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sharing, Inc. ("petitioner"), licensee of Station KBYO(FM), Channel 285A, Tallulah, Louisiana, requesting the substitution of Channel 283C3 for Channel 285A at Tallulah and modification of its license to specify operation on the higher powered channel. Petitioner states it will apply for channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 283C3 for Channel 285A at Tallulah, Louisiana, since the proposal could provide Tallulah with a wide coverage area FM service. Channel 283C3 can be allotted to Tallulah in compliance with the Commission's minimum distance requirements at the petitioner's present transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KBYO(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 283C3 at Tallulah or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tallulah, Louisiana	285A	283C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 6, 1991,** and reply comments on or before **September 23, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frank R. Jazzo, Esq.
Robert D. Primosch, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 283C3 at Tallulah are North Latitude 32-24-10 and West Longitude 91-04-00.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-77

In the Matter of

Amendment of Section 73.202(b), RM-7644
Table of Allotments,
FM Broadcast Stations.
(Pentwater, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 26, 1991; Released: July 16, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1833 (1991), proposing the substitution of FM Channel 231C3 for Channel 231A at Pentwater, Michigan, and modification of the construction permit (BPH-890511ML) for Station WSAB to specify the new channel. The *Notice* was issued in response to a petition filed by C&S Broadcasting, Inc. ("petitioner"). Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 231C3 for Channel 231A at Pentwater, thereby providing the community with enhanced service. As indicated in the *Notice*, Channel 231C3 can be allotted to Pentwater, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] Since Pentwater is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. We have authorized a modification of petitioner's construction permit for Station WSAB, Pentwater, to specify operation on Channel 231C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pentwater, Michigan	231C3, 276A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WSAB, Channel 231A, Pentwater, Michigan, IS MODIFIED to specify operation on Channel 231C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 231C3 at Pentwater are 43-46-38 and 86-26-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-212

In the Matter of

Amendment of Section 73.202(b), RM-7727
Table of Allotments,
FM Broadcast Stations.
(Kurten, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 26, 1991; Released: July 16, 1991

Comment Date: September 6, 1991
Reply Comment Date: September 23, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Kurten Broadcasting Company ("petitioner") requesting the allotment of Channel 245A to Kurten, Texas, as the community's first local FM service. Petitioner states that it will apply for channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Petitioner states that Kurten is located in Brazos County, which has a population of 77,862 and contends the community is listed in the U.S. Census. However, we have been unable to confirm that Kurten is included in the U.S. Census.[1] Therefore, the petitioner should present the Commission with further information to demonstrate that Kurten has social, economic, cultural, and governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. Channel 245A can be allotted to Kurten in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 kilometers (6.4 miles) west to avoid a short-spacing to a construction permit (BPH-880428MM) for Channel 246C1, Cleveland, Texas, as well as to accommodate petitioner's desired site.[2] The use of the site restriction does not obviate the spacing conflict with the pending application filed by Texas Classical Radio, Inc. ("Texas Classical"), (BMPH-910315ID) for Channel 246C1 at Cleveland, Texas. However, as is established Commission policy, rule making proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, Al*, 49 FR 32201, August 13, 1984, *Las Vegas, NV*, 51 FR 9453, March 19, 1986. Therefore, a copy of this *Notice of Proposed Rule Making* will be served on Texas Classical to advise the applicant that it may be required to amend its application to specify a nonconflicting site, in the event Channel 245A is ultimately allotted to Kurten. In addition, this proposal is contingent upon Station KIOX(FM), Channel 245C1, El Campo, Texas, receiving its license to operate on Channel 245C1 in accordance with the site specified in its outstanding construction permit. Therefore, we may not finalize this proceeding until the El Campo station is licensed accordingly.

4. We believe the public interest would be served by seeking further information on the status of Kurten as a community for allotment purposes, since the allotment of Channel 245A could provide the community with a first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Kurten, Texas	--	245A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following applicant for Channel 246C1 at Cleveland, Texas: Texas Classical Radio, Inc., 1600 Smith Street, Suite 5100, Houston, Texas 77002.

7. Interested parties may file comments on or before **September 6, 1991,** and reply comments on or before **September 23, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

[1] Kurten is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 150. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983).

[2] The coordinates for Channel 245A at Kurten are North Latitude 30-47-06 and West Longitude 96-22-15.

Mark Fields, Esq.
Miller & Fields
Post Office Box 33003
Washington, D.C. 20033
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-449

In the Matter of

Amendment of Section 73.202(b),	RM-6802
Table of Allotments,	RM-7258
FM Broadcast Stations.	
(Kings Beach, California and	
Fallon, Nevada)	

REPORT AND ORDER
(Proceeding Terminated

Adopted: June 24, 1991; Released: July 16, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein a *Notice of Proposed Rule Making* ("*Notice*") in this proceeding, 4 FCC Rcd 7489 (1989), in response to a petition (RM-6802) filed on behalf of Kidd Communications, Inc., ("Kidd"). Kidd holds a construction permit for a station at Kings Beach, California and proposes that the station be upgraded by substituting Channel 299C3 (107.7 MHz) for Channel 299A and that its permit be modified accordingly. Atrium Broadcasting Company ("Atrium") timely filed a mutually exclusive counterproposal (RM-7258)[1] requesting that Channel 299A be allotted to Fallon, Nevada as that community's first local aural service. Kidd and Atrium each filed comments and reply comments to Kidd's proposal. Kidd also timely filed a supplemental reply to Atrium's counterproposal.[2]

2. In its comments Kidd reaffirms its interest in upgrading its proposed station to Class C3. Atrium, in its comments, titled a "Counter Petition for Rulemaking", submits its counterproposal, stating that it will apply for Channel 299A, if allotted to Fallon, and will construct the station promptly. It also opposes the Kings Beach allotment. Alleging that no direct line of sight exists from Kidd's proposed site to all of Kings Beach because of mountainous terrain, Atrium claims that a diffraction loss of 32.2 dB is experienced. Atrium amplifies its comments in a reply, alleging that because of that loss, Kidd's proposed station would not be able to provide principal city coverage of 70 dBu to Kings Beach. The predicted signal would be limited to 46.04 dBu,[3] claims Atrium. It submits a profile graph purporting to show that, given a diffraction loss of 32.2 dB, Kidd would have to operate with an antenna tower of almost 7000 feet to overcome that loss in order to place a 70 dBu signal over Kings Beach. Such a tower is "impossible to construct," argues Atrium.

3. Kidd replies that Atrium's profile graph does not indicate the source of the terrain data it employed, and that if 30-second data were used," then there is room for error." Further doubt is cast on the adequacy of that graph because it "does not show both the near and far boundaries of the community," states Kidd. Its owner, Chris W. Kidd, submits a statement that, on the supposition that 30-second data were indeed employed, they lack "sufficient registration in extracted terrain profiles to be meaningful in this situation." He states that he performed a comprehensive study (which is not provided, however) using acceptable methodology that shows that a 70 dBu signal would be placed over all of Kings Beach. Kidd does provide channel studies to support its claim that there are at least four other Class A channels that can be used at Fallon that are not mutually exclusive with the use of Channel 299C3 at Kings Beach. In a supplemental reply to Atrium's counterproposal, contrary to Atrium's claims otherwise, Kidd urges that three aural stations operate at Fallon--one each commercial AM, commercial FM, and noncommercial FM.

4. After careful consideration of all the information before us, we conclude that both allotment requests can be granted, and that the public interest would be served by providing for a wide area FM service in Kings Beach and by the establishment of an additional FM service in Fallon. As to Atrium's claim that the reception of a 70 dBu signal is precluded by shadowing, it does appear to occur if one assumes that the ground elevation of the site is the same as the height of the transmitting antenna, as Atrium apparently assumes. However, we make the assumption that the antenna would be mounted atop a tower 100 meters tall. Therefore, in viewing the profile graph that we generated (from 30-second data), one observes that the signal path to Kings Beach appears to clear comfortably the obstruction along the 232° radial. The field strength of the signal received, as predicted by the Commission's F(50,50) curves, then, is more than 70 dBu.[4] This is all that is required to show that a community would receive principal city coverage. Thus, on this basis we reject Atrium's claim.

5. Moreover, even if we were to consider Atrium's claim that shadowing would cause diffraction losses so great that Kings Beach would not receive a signal of the

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[1] Notice of Atrium's counterproposal was given by *Public Notice*, Report No. 1807, released February 6, 1990.

[2] Atrium also submitted a third set of comments, but they were untimely filed more than 15 days after *Public Notice* of Atrium's counterproposal, during which period replies to counterproposals are permitted. Therefore, we will not consider those comments in this proceeding.

[3] Atrium argues that along the 232.37^0 radial toward Kings Beach the height above terrain at Kidd's proposed site is 269.1 ft less than the overall height above average terrain around that site (2275.9 ft - 2545 ft). Atrium claims that "[e]ven if the height above average terrain along the 232.37^0 radial was equal to the overall height above average terrain, [Kidd's] proposed station would be limited to 78.24 dBu at 14.22 km (8.84 mi). "With a diffraction loss of 32.2 dB computed at this point, Atrium claims that the net predicted received signal strength in Kings Beach would be 46.04 dBu (78.24dBu - 32.2dB).

[4] Coordinates for the transmitter site as proposed by Kidd and stated in the *Notice* are 39-18-50 and 119-53-00, which is 14.6 km removed from the city reference point for Kings Beach at 39-14-18 and 120-01-18. We note that Atrium and Kidd used different site elevations. Atrium used 9371.3 feet or 2856.4 meters AMSL, whereas Kidd used 2941 meters AMSL. We, however, split the difference and used 2900 meters [(2856.4 + 2941)/2 = 2898.7] for our profile graph.

required minimum 70 dBu, Atrium's showing is faulty. Atrium states that these losses were "calculated in accordance with National Bureau of Standards Technical Note 101," an alternative propagation method. Rule Section 73.313 provides for the submission of such propagation methods as Tech Note 101 to supplement, but not supplant, the Commission F(50,50) curves when the terrain departs widely from average terrain, as it appears to do here. For such use to be valid, however, Section 73.313 mandates that the proponent must describe the procedures used in preparing the study as well as the assumptions made and the methodology employed. The proponent must also provide sample calculations. Atrium does not do any of this. It only declares that Tech Note 101 was used to calculate the diffraction losses. Such failures alone invalidate its allegations of a received signal of less than 70 dBu. Atrium also does not attempt to show the extent of the alleged faulty coverage. It does not show, for example, the boundaries of Kings Beach and the extent to which the 70 dBu coverage of the city allegedly is lacking. Therefore, even if its showing were permissible, Atrium's Tech Note 101 analysis is invalid, because it does not comply with the standards set out for use of alternative propagation methods. Moreover, the degree to which 70 dBu coverage is claimed to be deficient is not shown.

6. We conclude that the substitution of Channel 299C3 at Kings Beach can be made at the site recommended by Kidd and proposed in the *Notice*. We have confirmed that Channel 299C3 can be allotted to Kings Beach consistent with the Commission's minimum distance separation requirements of Section 73.207. Atrium's request for a channel to provide an additional FM service to Fallon also can be satisfied by the alternative allotment of Channel 267A. Staff analysis reveals that Channel 267A can be allotted to Fallon consistent with the distance separations requirements.[5]

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Kings Beach, California	299C3
Fallon, Nevada	267A

8. IT IS FURTHER ORDERED That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Kings Beach, California on Channel 299A IS MODIFIED to specify operation on Channel 299C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. The window period for filing applications for Channel 267A at Fallon, Nevada will open on **September 3, 1991** and close on **October 3, 1991**.

10. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

11. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] Reference coordinates for Fallon are located at 39-28-24 and 118-46-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-18

In the Matter of

Amendment of Section 73.202(b),	RM-6510
Table of Allotments,	RM-6586
FM Broadcast Stations.	RM-6725
(Clinton, Saint Pauls	
and Southern Pines,	
North Carolina, and	
Chesterfield, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 24, 1991; Released: July 16, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1557 (1989), requesting comments on two mutually exclusive petitions for rule making. C. Curtis Sigmon ("Sigmon") requested the allotment of Channel 297A to Chesterfield, South Carolina, as the community's first local FM service. Sampson Broadcasting Co., Inc. ("SBC"), requested the substitution of Channel 295C2 for Channel 296A at Clinton, North Carolina, and the modification of its license for Station WCLN-FM to specify operation on the higher powered channel.[2] In order to accommodate Channel 295C2 at Clinton, SBC also requested the substitution of Channel 297A for unoccupied but applied for Channel 295A at Saint Pauls, North Carolina. Sigmon and SBC filed comments. In addition, Muirfield Broadcasting, Inc. ("Muirfield"), licensee of Station WIOZ(FM), Southern Pines, North Carolina, filed a counterproposal requesting the substitution of Channel 295C2 for Channel 296A at Southern Pines, the modification of its license to specify the higher powered channel, and the substitution of Channel 297A for Channel 295A at Saint Pauls.[3] Sigmon, SBC and Muirfield filed reply comments.[4] These three proposals are mutually exclusive. Channel 297A cannot be allotted to both Saint Pauls and Chesterfield since they are located only 101 kilometers apart, while the Commission's rules specify a 105 kilometer separation for co-channel Class A allotments and we were unable to site restrict the Chesterfield allotment in such a manner as to avoid the conflict. Channel 295C2 cannot be allotted to both Clinton and Southern Pines because they are located only 111 kilometers apart while the Commission's rules specify a 190 kilometer separation between co-channel Class C2 allotments.[5]

2. Muirfield states that the allotment of Channel 295C2 to Southern Pines should be preferred over its allotment to Clinton since the channel's use at Southern Pines would result in the provision of new second, third, fourth and fifth nighttime aural reception service as well as a greater increase in population served within Station WIOZ(FM)'s gain area. Muirfield submits that Station WIOZ(FM), as a Class C2, will serve 424,091 persons, as compared to its present Class A service encompassing 41,207 persons, for a gain population of 382,884 persons. On the other hand, Muirfield states that Station WCLN-FM at Clinton, as a Class C2, will serve 162,792 persons, as compared to its present 43,726 persons, for a gain population of only 119,066 persons. Further, it points out that an upgraded Station WIOZ(FM) would provide a second nighttime aural reception service to 2,461 persons within an 81 square kilometer area, a third nighttime aural reception service to 20,356 persons in an area of 260 square kilometers, a fourth nighttime aural reception service to 28,901 persons in an area of 469 square kilometers and a fifth nighttime aural reception service to 22,797 persons in a 603 square kilometer area. It compares this with the provision of only a fifth nighttime

[1] The community of Southern Pines, North Carolina, has been added to the caption.

[2] The *Notice* erroneously stated that Station WCLN-FM presently operates on Channel 297A instead of Channel 296A.

[3] Public Notice of the filing of the counterproposal was given on April 20, 1989, Report No. 1776. A counterproposal was also filed by Lumbee Regional Development Association, Inc. ("Lumbee"), applicant for Channel 295A, Saint Pauls, requesting the substitution of Channel 294C3 for Channel 295A at Saint Pauls and the modification of its application to specify the higher powered channel. This counterproposal was not accepted for consideration since the rules permitting Class C3 allotments were not in effect at the time of the filing of the counterproposal. In addition, Commission policy does not provide cut-off protection to applicants seeking higher class facilities. Rather, a new filing window would be required in order to afford other interested parties an opportunity to file for the new channel.

[4] Sea-Comm, Inc., submitted in this proceeding a copy of its petition for rule making requesting the substitution of Channel 297C2 for Channel 298C2 at Southport, North Carolina. However, the petition for rule making was returned by staff letter of October 12, 1989, based upon a finding that the Southport proposal constituted an untimely filed counterproposal because it conflicted with the proposed allotment of Channel 297A to Saint Pauls but was filed after the time for filing initial comments. Therefore, the pleading of Sea-Comm is moot and will not be discussed.

After the record closed, Muirfield also filed supplemental comments proposing additional channel changes based on the decision of the Court of Appeals in *Reeder v. FCC*, 865 F. 2d 1298 (D.C. Cir. 1989). Marine Broadcasting Corporation opposed acceptance of this pleading. The Commission's rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Further, as set forth in the *Notice of Proposed Rule Making*, counterproposals will not be considered unless filed by the deadline for initial comments. Therefore, we will not accept Muirfield's supplemental comments.

[5] The petitions under consideration in this proceeding were filed before October 2, 1989. Therefore, the minimum distance separation requirements used herein are those which were in effect prior to the effective date of the new spacing requirements adopted in MM Docket No. 88-375. *See* 4 FCC Rcd 6375 (1989).

aural reception service to 5,871 persons within a 99 square kilometer area from an upgraded Station WCLN-FM operation.

3. In addition, Muirfield states that the allotment of Channel 295C2 to Southern Pines will still permit Chesterfield to receive its first local FM service by the allotment of Channel 297A. Muirfield contends that the required substitution of Channel 297A for Channel 295A at Saint Pauls, for which an application is pending, will have no adverse effect on the applicant because a construction permit has not yet been granted. Further, although the allotment of Channel 297A at Saint Pauls may require the specification of a different transmitter site, it believes that this could be necessary even if its proposal is denied since the applicant's existing proposed transmitter site is short-spaced to the proposed allotment of Channel 297A at Chesterfield.

4. Sigmon filed comments suggesting new transmitter site coordinates for Channel 297A at Saint Pauls. He believes that both allotments can be accommodated if the Saint Pauls allotment is restricted to an area at least 6.8 kilometers (4.2 miles) northeast. Alternatively, Sigmon suggests that the Chesterfield transmitter site coordinates can be changed to reflect a site at least 9.8 kilometers (6.1 miles) south. However, he claims that a change in the Chesterfield reference coordinates is less desirable since it would affect the provision of city grade service to all of the community. Sigmon reiterates its intention to apply for the channel, if allotted to Chesterfield.

5. Sampson reiterates its intention to apply for Channel 295C2, if allotted to Clinton. It contends that the public interest would be served if Station WCLN-FM is upgraded since it would result in increased coverage to Sampson County, which it states has no other FM service licensed within the county's boundaries. In order to resolve the mutual exclusivity with Sigmon's request it suggests that Channel 295A be allotted to Chesterfield as that community's first local FM service. Sampson states that Channel 295A can be allotted to Chesterfield in compliance with the Commission's minimum distance separation requirements with an appropriate site restriction.

6. In reply comments, Sigmon requests that his proposal for Chesterfield be severed from this proceeding. He states that Channel 297A is the only frequency which can be allotted to Chesterfield at the present time. Further, he states that, based upon the showing contained in his comments, the allotment at Chesterfield is no longer dependent upon a decision regarding Channel 297A at Saint Pauls because both can be accommodated with the use of appropriate site restrictions. However, in an effort to resolve the proceeding and also provide upgrades for both Clinton and Southern Pines, Sigmon suggests that Station WCLN-FM at Clinton be upgraded from Channel 296A to Channel 297C3, that Station WIOZ(FM) at Southern Pines be upgraded from Channel 296A to Channel 295C2, that Channels 297A, 294C3, 299A or Channel 299C3 be substituted for the unoccupied but applied for Channel 295A at Saint Pauls, and that Channel 297A be allotted to Chesterfield. Sigmon recognizes that the allotment of Channel 294C3 at Saint Pauls would be precluded if Channel 295C2 is allotted to either Clinton or Southern Pines, and Channels 299A and 299C3 at Saint Pauls and 297C3 at Clinton would be precluded if Channel 299A is allotted to Fair Bluff, North Carolina, as requested by Marine Broadcasting Company. *See* Public Notice, Petitions for Rule Making Filed, Report No. 1809, released March 14, 1990.

7. Sampson, in reply comments, states that it does not object to any of the proposals advanced by Sigmon, provided that the proposals permit the upgrading of Station WCLN-FM to Class C2 status. In response to Muirfield's counterproposal, Sampson argues that the upgrading of Station WCLN-FM should be preferred. It states that, as a Class C2 facility, the station would be able to provide consistent, reliable service to all of Sampson County, a service it is presently unable to provide as a Class A station. Sampson does not dispute the gain area showing submitted by Muirfield. However, Sampson believes that if the Commission looks "beyond the surface numbers to the actual local needs of the region," it will find that the Clinton proposal should be preferred. Alternatively, should Station WIOZ(FM) at Southern Pines be preferred for the Class C2 allotment, Sampson requests that its Station WCLN-FM be upgraded to specify operation on Channel 297C3. It states that the channel can be allotted to Clinton in compliance with the Commission's minimum distance separation requirements at coordinates North Latitude 35-05-00 and West Longitude 78-26-00. As to the allotment of Channel 299 to Saint Pauls, Sampson proposes that the channel be allotted as a Class A, rather than a Class C3, frequency, to avoid the necessity of opening a new filing window. Finally, should Channel 299 be unavailable for allotment to Saint Pauls, Sampson proposes that Channel 294C3 be substituted for Channel 295A at Saint Pauls and Channel 297C3 be substituted for Channel 296A at Clinton. This allotment scheme, according to Sampson, will allow the Commission to upgrade two Class A stations at Clinton and Saint Pauls to Class C3 and allot a first local channel to Chesterfield as opposed to Muirfield's proposal which would result only in upgrading Station WIOZ at Southern Pines to Channel 295C2 and allotting a first local channel to Chesterfield.

8. Muirfield, in reply, states that Channel 299A or Channel 299C3 can be used at Saint Pauls, as proposed, if Channel 235A, rather than Channel 299A, is substituted for Channel 287A at Fair Bluff, North Carolina. It submits that use of Channel 235A at Fair Bluff will not impinge on Marine Broadcasting Company's request to upgrade its Jacksonville, North Carolina, station to specify operation on Channel 287C2.

9. We have carefully reviewed all of the pleadings before us and find that the public interest would be better served by the substitution of Channel 295C2 for Channel 296A at Southern Pines, North Carolina, thus permitting Station WIOZ(FM) to provide a second fulltime aural reception service by expanding its coverage area, and the allotment of Channel 297A to Chesterfield, South Carolina, as its first local FM service. In *Revision of FM Policies and Procedures*, 90 FCC 2d 88 (1982), the Commission set forth the following allotment priorities:

(1) First fulltime aural service;

(2) Second fulltime aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

The staff's engineering analysis of the proposals confirms that the allotment of Channel 295C2 to Southern Pines will further the second highest allotment priority by providing a second fulltime aural service to 553 persons within a 22 square kilometer area. While this is less than the 2,461 persons claimed by Muirfield in its counterproposal, we note that no second fulltime aural service would result from the allotment of Channel 295C2 at Clinton. Further, the allotment of Channel 295C2 to Southern Pines results in a gain in population served of 382,884 persons compared to only 119,066 persons from the allotment of Channel 295C2 to Clinton. While Sampson argues that the Commission should look beyond the numbers to the needs of the community, we find that it has made no compelling showing that the service which Station WCLN-FM could provide to Sampson County if it operated on Channel 295C2 would better serve the public interest. It claims that Station WCLN-FM is unable to provide reliable service to all of Sampson County. However, it has not made any showing that the areas currently unserved by its station are inadequately served by any other nearby stations. Unlike the allotment of Channel 295C2 at Southern Pines, the allotment at Clinton would not provide any second, third or fourth fulltime aural service and would provide an additional service to no more than approximately one-third as many people. Therefore, we will deny Sampson's request that Channel 295C2 be substituted for Channel 296A at Clinton, North Carolina.

10. We also deny Sampson's request to allot Channel 297C3 to Clinton and Channel 294C3 to Saint Pauls. First, the proposed allotment of Channel 294C3 to Saint Pauls constitutes an untimely filed counterproposal because it seeks the allotment of a higher class channel than that proposed in the *Notice*. Section 1.420(d) states that counterproposals must be advanced in initial comments and will not be considered if advanced in reply comments. Sampson's proposal was advanced in reply comments. Second, the allotment of Channel 294C3 at Saint Pauls would require the opening of a new filing window and thus the loss of Lumbee's cut-off protection. We would not take such action without the express approval of all affected applicants and no such approval has been provided. *See Lafayette, Louisiana,* 2 FCC Rcd 7303 (1987). Therefore, the only valid portion of Sampson's reply comments to be considered is its decision to accept a C3 channel in lieu of a C2. The decision of Sampson in reply comments to accept a lower class allotment than proposed in the *Notice* is not considered to be a counterproposal because it does not introduce a new community or propose a higher class allotment than proposed in the *Notice,* with the attendant possibility of foreclosing other changes to the Table of Allotments without providing notice to affected parties and an opportunity for such parties to submit comments. Thus, the comparison to be made is between the upgrading of Station WCLN-FM at Clinton from a Class A to a Class C3 and the upgrading of Station WIOZ(FM) at Southern Pines from a Class A to a Class C2. Adoption of either proposal would permit a first local service at Chesterfield. Certainly, if the higher powered Class C2 allotment at Clinton cannot favorably compare with the Class C2 allotment at Southern Pines, the lower powered C3 upgrade would fare even less favorably.

11. Channel 297A can be substituted for Channel 295A at Saint Pauls in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.2 miles) southeast, the site specified in Lumbee's pending application (BPH-880727MN). Channel 295C2 can be substituted for Channel 296A at Southern Pines in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) west to accommodate Muirfield's desired transmitter site. Channel 297A can be allotted to Chesterfield in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[6] As proposed, we will modify Muirfield's license for Station WIOZ(FM) to specify operation on Channel 295C2 in lieu of its present Channel 296A. Further, we will require Lumbee to amend its pending application to specify Channel 297A at Saint Pauls. However, Lumbee will retain its cut-off protection.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Saint Pauls, North Carolina	297A
Southern Pines, North Carolina	273A, 295C2
Chesterfield, South Carolina	297A

13. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Muirfield Broadcasting, Inc. for Station WIOZ(FM), Southern Pines, North Carolina, IS MODIFIED to specify operation on Channel 295C2, in lieu of Channel 296A, subject to the following conditions:

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[6] The coordinates for Channel 297A at Saint Pauls are North Latitude 34-42-59 and West Longitude 78-56-51. The coordinates for Channel 295C2 at Southern Pines are 35-09-04 and 79-28-40. The coordinates for Channel 297A at Chesterfield are 34-44-06 and 80-05-18.

Because the petitions which resulted in these allotments were filed prior to October 2, 1989, the Lumbee Regional Development Association, in modifying its pending application for Channel 295A at Saint Pauls to specify Channel 297A, may avail itself of the provisions of Section 73.213(c)(1) with respect to Stations WCLN, Channel 296A, Clinton, North Carolina and WCIG, Channel 296A, Mullins, South Carolina, and the Channel 297A allotment at Chesterfield, South Carolina.

Applicants for Channel 297A at Chesterfield, South Carolina, may avail themselves of the provisions of Section 73.213(c)(1) with respect to Station WRHM, Channel 296A, Lancaster, South Carolina and Channel 297A at St. Pauls.

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order*, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 295A at Saint Pauls, as follows: Lumbee Regional Development Association, Inc., P.O. Box 68, Pembroke, North Carolina 28372.

15. IT IS FURTHER ORDERED, That the petition of Sampson Broadcasting Co., Inc. requesting the substitution of Channel 295C2 for Channel 296A at Clinton, North Carolina, and the modification of its license for Station WCLN-FM to specify operation on the higher powered channel (RM-6510), IS DENIED.

16. The filing window for Channel 297A at Chesterfield, South Carolina, will open on **September 3, 1991,** and close on **October 3, 1991**

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

(CORRECTED)

MM Docket No. 90-83

In re Applications of

WILLIAM E. KUIPER, JR. — File No. BPH-880125MA

GNS BROADCASTING — File No. BPH-880126MH

Betty Jean Goulooze and John Robert McClure, Jr. d/b/a WALKER BROADCASTING CO. — File No. BPH-880126NE

For Construction Permit for
New FM Station, Channel 263A,
Walker, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; Released: July 15, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. In his *Initial Decision*, FCC 91D-30, released June 7, 1991, Administrative Law Judge Edward Luton determined, on a comparative basis, that GNS Broadcasting (GNS) was the superior applicant and granted its application for a new FM station to serve Walker, Michigan. The remaining two applicants, William E. Kuiper, Jr. (Kuiper) and Walker Broadcasting Co. (Walker) were found fully qualified to be Commission licensees.

2. However, rather than pursue this matter further, the parties have jointly agreed to settle this proceeding. Thus, now before the Board is a Joint Request for Approval of Settlement Agreement filed by the captioned parties on July 1, 1991.

3. By the terms of the settlement agreement, which is included as an exhibit to the Joint Request, the applications of GNS and Walker would be dismissed with prejudice, and the application of Kuiper would be granted. Kuiper would pay GNS $107,000, and Walker $53,000 as consideration for the dismissal of their applications (subsequent to the time that the subject grant and dismissals become final).

4. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 CFR § 73.3525(a) that govern settlement agreements. Attached to the Joint Request is a copy of the joint agreement between the parties which contains declarations from the principals of the applicants setting forth the reasons why the agreements are in the public interest, and stating that their applications were not filed for the purpose of carrying out the settlement agreement. This resolution of the proceeding will serve the public interest by expediting the institution of new FM service in Walker, Michigan.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement filed July 1, 1991 by the captioned parties IS GRANTED; that the attached joint settlement agreement IS APPROVED; that the applications of GNS Broadcasting (File No. BPH-880126MH), and Betty Jean Goulooze and John Robert McClure, Jr. d/b/a Walker Broadcasting Co. (File No. BPH-880126NE) ARE DISMISSED with prejudice; and that the application of William E. Kuiper, Jr. (File No. BPH-880125MA) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: July 17, 1991

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In re: Jerry J. Collins NEW, Junction City, Oregon,	File No. BP-880503AE
Jerry J. Collins NEW, Troutdale, Oregon,	File No. BP-880531AF
Bjornstad Broadcasting Company NEW, Eugene, Oregon,	File No. BP-871028AC
J&K Broadcasters NEW, Springfield, Oregon	File No. BP-880531AE

Gentlemen:

This letter refers to the above-captioned applications for construction permits for new AM radio stations in Junction City and Troutdale, Oregon, filed by Jerry J. Collins ("Collins"); in Eugene, Oregon, filed by Bjornstad Broadcasting Company ("Bjornstad"); and in Springfield, Oregon, filed by J&K Broadcasters ("J&K"). On November 7, 1989, you filed a joint request for approval of a settlement agreement among the parties to the above applications which would result in grants of three of the four applications. On November 29, 1989, May 7, 1990, and October 23, 1990, this settlement agreement was supplemented by the parties with respect to issues pertaining to Section 307(b) of the Communications Act of 1934, as amended, and Sections 73.3525(b)(1) and 73.3571(j)(1) of the Commission's Rules.

In accordance with Section 73.3525 (a)(1) and (2) of the Rules, the agreement includes the parties' sworn statements of reasons why the settlement agreement is in the public interest and that their applications were not filed for the purpose of carrying out the settlement agreement. The parties state that approval of the agreement is in the public interest because it will remove the conflicts among their applications and will avoid the necessity of a comparative hearing, as well as enable Junction City and Troutdale to receive first transmission service.

The settlement provides that J&K's application will be dismissed in consideration for payment of $1,000 by Collins and $5,000 by Bjornstad, and that Bjornstad's application is being amended to specify 840 kHz rather than 860 kHz.[1] The Collins applications for stations at Junction City and Troutdale will be prosecuted as filed. As originally proposed, Bjornstad's use of 860 kHz at Eugene is mutually exclusive with both J&K's Springfield application at 840 kHz and Collins' Troutdale application at 860 kHz, but the Springfield and Troutdale applications are not mutually exclusive with each other. Collins' Junction City application is not mutually exclusive with any of the applications, but it has been included in the settlement agreement by the parties. J&K's proposed dismissal of its application for 840 kHz at Springfield, a community immediately adjacent to Eugene, makes 840 kHz available for use in Bjornstad's amended Eugene application and eliminates the mutual exclusivity between the Eugene and Troutdale applications.

The settlement agreement is subject to the condition that the Commission issue one unified Order which grants all terms of the settlement agreement including: (1) grant of Bjornstad's Eugene application as amended without subjecting it to the Commission's cut-off procedure under Section 73.3571(j)(1) of the Rules;[2] and (2) dismissal of J&K's Springfield application without requiring republication of local public notice pursuant to Section 73.3525(b)(1) of the Commission's Rules. First, we consider the request for waiver of Section 73.3571(j)(1) of the Commission's Rules. In their May 7, 1990 and October 23, 1990 supplements, the parties contend that it would serve the public interest to allow Bjornstad's amended application to be prosecuted as part of the settlement without being assigned a new file number and being subjected to the Commission's cut-off process.

We find that a grant of a waiver would be in the public interest. First, the amendment eliminates the requirement for a comparative proceeding and permits the immediate grant of three of the four pending applications (Eugene, Troutdale and Junction City), including two applications (Troutdale and Junction City) for first local broadcast service. *See, e.g., Las Americas Communications, Inc.*, 5 FCC Rcd 1634 (1990), *remanded on other grounds*, FCC 91-62 (released March 13, 1991) (settlement agreement approved and amendment accepted without subjecting application to cut-off despite applicant's failure to demonstrate strict compliance with "good cause" factors pursuant to Section 73.3522). Second, all parties have joined in the settlement agreement and, therefore, a waiver would not prejudice competing applicants or cause undue disruption of the Commission's administrative processes. *See Gilbert Broadcasting Corp.*, 91 FCC 2d 450 (1982). Third, a grant of a waiver of Section 73.3571(j)(1)

would not cause a loss of right of reasonable notice to any theoretical potential applicant or objector, since the applications have already gone through the Commission's cut-off procedure. That procedure apprised potential applicants or objectors of the identities of the applicants, frequencies and locations involved. Fourth, the proposed contours in Bjornstad's amended Eugene application are essentially the same as J&K's proposed contours for Springfield. Thus, the amended Eugene application basically has no greater a preclusive effect on new applications than the Springfield application, which, as noted, was subjected previously to the Commission's cut-off process. To the extent the contours proposed in the applications are not congruent, any differences are no greater than would have been accounted for by a minor amendment to the Springfield application. Such an amendment would not have been placed on local public notice or a cut-off list. Therefore, given the facts and circumstances of this case, we see nothing which militates against allowing Bjornstad to amend its application to specify 840 kHz, and we conclude that a grant of a waiver of Section 73.3571(j)(1) is justified.

Next we consider whether to require republication of notice pursuant to Section 73.3525(b)(1) of the Commission's Rules. Under Section 73.3525(b)(1), when the terms of a settlement agreement include the withdrawal of an application, the Commission shall require republication of local public notice in the community of the withdrawing application if it determines that the application's withdrawal would unduly impede achievement of a fair, efficient and equitable distribution of radio service under Section 307(b) of the Communications Act of 1934, as amended. *See, e.g., Mobile Broadcasting Service, Inc.*, 52 RR 2d 670 (1982). [3]

In this case, Springfield is the community for which an application will be withdrawn pursuant to the settlement. Springfield currently has three stations licensed to it as a community, and two other stations dual-licensed to Springfield/Eugene. The parties also represent that Springfield, as a community adjacent to Eugene, is served by the seven stations licensed to serve Eugene. Furthermore, as pointed out, the Collins applications for Troutdale and Junction City are proposing first transmission service to their respective communities. Because Springfield is amply served and Troutdale and Junction City will receive first service, we find that the principles embodied in Section 307(b) of the Act are not unduly impeded by the terms of the settlement agreement, and republication therefore will not be required. *See J-Star Broadcasting Co., Inc.*, 74 FCC 2d 432 (1979).

Finally, we note that prior to the settlement, Bjornstad filed petitions to deny against the Junction City, Troutdale, and Springfield applications, which were opposed by Collins and J&K, respectively. Based on the above-mentioned settlement agreement, which withdraws the petitions, and a review of the petitions and responsive pleadings, we find that no substantial and material question of fact remains with respect to the issues raised in the petitions to deny.

Based on the above, we conclude that the parties have complied with the procedural requirements for settlement agreements, and have shown adequate justification for a grant of a waiver of Section 73.3571(j)(1) of the Rules. Further, we conclude that republication is unwarranted pursuant to Section Section 73.3525(b)(1) of the Rules. Accordingly, we hereby approve the settlement agreement. Pursuant to the agreement, the petitions to deny filed by Bjornstad and the application for a construction permit for a new AM station in Springfield, Oregon, filed by J&K Broadcasters (File No. BP-880531AE) ARE DISMISSED. Finally, the applications for construction permits for new AM stations in Junction City and Troutdale, Oregon, filed by Jerry J. Collins (File Nos. BP-880503AE, BP-880531AF) and the amended application for a construction permit for a new AM station in Eugene, Oregon, filed by Bjornstad Broadcasting Company (File No. BP-871028AC) ARE GRANTED.

This letter was adopted by the Commission on July 3, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The new rule adopted by the Commission which limits settlement payments in cases involving competing applications for construction permits for new broadcast stations is not applicable to agreements such as this one, which was filed prior to the rule's adoption. *See Amendment of Section 73. 3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits (MM Docket No. 90-263)*, 6 FCC Rcd 85 (1990), *modified on recon.*, FCC 91-155, 56 Fed. Reg. 28096 (June 19, 1991).

[2] Under Section 73.3571(j)(1) of the Rules, an amendment to an application for construction permit proposing change of frequency is considered to be a major modification of facilities, subject to assignment of a new file number and placement in the processing line according to the numerical sequence of the new file number. When accepted for filing, such applications are placed on a list published periodically by the Commission which announces a date ("cut-off") on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

[3] The Commission's priorities under Section 307(b) are, in order of importance, (1) first aural service (reception service), (2) second aural service, (3) first local service (transmission service), and (4) other public interest considerations. Coequal weight is given to (2) and (3). *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982). The Commission recognized that AM and FM have become joint components of a single aural medium; therefore, these priorities are applicable to both services. *Id.* at 92.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: July 17, 1991

KQED, Inc.
c/o Peter Tannenwald, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Dear Mr. Tannenwald:

This is in response to your letter of April 26, 1991, and the letter of George S. Sarlo, Chairman of the Board of KQED, Inc., which were filed on behalf of KQED, Inc. (KQED), licensee of noncommercial educational television station KQEC (Channel 32), San Francisco, California. You note that the Commission denied KQED's application for renewal of KQEC-TV's license and granted the application of Minority Television Project (MTP) to construct a new noncommercial educational television station on Channel 32. *KQED, Inc.*, 5 FCC Rcd 1784 (1990). KQED was permitted to continue operation of the television station until 12:01 a.m. of the ninety-first day following the release of the Commission's order or, if reconsideration or judicial review was sought, then until 12:01 a.m. of the ninety-first day following the release of any reconsideration order or when judicial review was completed. *Id.* at 1786. KQED initially sought judicial review, but on May 2, 1991, the United States Court of Appeals for the District of Columbia Circuit granted KQED's motion for dismissal of its appeal. As you note, KQEC-TV is required to cease operations on August 1, 1991. However, you request that KQED be permitted to operate KQEC-TV until August 31, 1991, which would exceed the permitted 91 days by an additional 30 days.

In support of its request, KQED's Chairman contends that the additional time requested would permit a more orderly transfer of programming from KQEC-TV to KQED-TV without any discontinuation of the Channel 32 public television service to the Bay Area. This would enable MTP, he states, to commence operations at the start of a new viewing season, which begins around Labor Day. In addition, KQED's Chairman represents that KQEC-TV will be shut down sooner, if MTP decides to commence operating before August 31th. Finally, he states that KQED's lease on the Mt. Sutro tower is available to be assigned to MTP, and that, while KQED will discontinue maintenance of the KQEC transmitter, transmitter line and antenna when KQEC-TV's operation is terminated, the equipment will be left in place and made available to MTP, if it chooses, under mutually agreeable conditions.

The extension requested by KQED is for a limited period and it is not opposed by MTP, which was served with a copy of the request. In view of the foregoing and based on the representation made by KQED that it would cease KQEC-TV's operations if MTP desired to commence operations prior to August 31, 1991, we find that the public interest would not be disserved by approval of KQED's request. Accordingly, the time at which KQED is required to cease operation of KQEC-TV is extended to 12:01 a.m., August 31, 1991.

This letter was adopted by the Commission on July 8, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHONELINK, INC. File No. I-T-C-91-124

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 5, 1991; Released: July 17, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Phonelink, Inc.

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-124 IS GRANTED and Phoenix, Inc. is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-127

Application for authority to acquire and operate facilities for service between the U.S. and Saudi Arabia.

Application for authority to acquire and operate facilities for service between the U.S. and Poland. — File No. I-T-C-91-128

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 5, 1991; Released: July 17, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Saudi Arabia and Poland by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-91-127 and I-T-C-91-128 ARE GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 60 voice-grade satellite circuits between Beeline, Florida earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Saudi Arabia furnished by US Sprint's correspondent in Saudi Arabia;

b. use the facilities in a above to provide US Sprint's regulary authorized services between the U.S. and Saudi Arabia and beyond;

c. lease from Comsat and operate 60 voice-grade satellite circuits between Franklin, New Jersey earth station and an approparíate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Denmark, leased by US Sprint's correspondent in Poland;

d. lease on an Indefeasible Right of User (IRU) basis from US Sprint's correspondent in Denmark one E-1 half-circuit in the Denmark/Poland-2 submarine fiber optic cable system[1]; and

e. use the facilities in c and d above to provide US Sprint's regularly authorized services between the U.S. and Poland and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between US Sprint and its correspondents in Saudi Arabia and Poland and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] US Sprint's correspondent in Poland will provide the matching one E-1 half-circuit in the Denmark/Poland-2 submarine fiber optic cable system.

Before the
Federal Communications Commission
Washington, D.C. 20554

Application for Review of

Southern California Broadcasting Company
Licensee, Radio Station KIEV(AM)
Glendale, California

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; Released: July 17, 1991

By the Commission:

1. The Commission has under consideration an Application for Review of the Mass Media Bureau's September 27, 1990, decision imposing a $10,000 forfeiture on Southern California Broadcasting Company, licensee of radio station KIEV(AM), Glendale, California, for sponsorship identification violations, and denying its request for reduction of that forfeiture. The forfeiture was assessed for KIEV's willful and repeated violations of Section 317(a) of the Communications Act of 1934, as amended, and Section 73.1212(a) of the Commission's Rules. The violations arose from the station's broadcasts of "Investors Club of the Air" from December 2, 1985, through August 20, 1986, and "Travel Talk" from May 26, 1986, through August 1986, without announcing that consideration had been provided for the airing of those programs. The violations were evidenced by a tape of one of the broadcasts, and copies of sales contracts from the program sponsors.

2. By way of background, the Commission received a complaint that KIEV had broadcast promotional programs without announcing that consideration had been paid for the airing of the programs. In response to a Bureau letter of inquiry, KIEV acknowledged that "Investors Club of the Air," a 90-minute program aired Monday through Friday, had been paid for by Investors Club of the Air and stated that the program would be identified as such in the future. KIEV also stated that Richard Epstein had purchased the time for "Travel Talk," a daily 30-minute program, but Commission review of an audiotape of a July 30, 1986, broadcast of that program revealed that no sponsorship identification announcement had been provided. The Bureau issued a $10,000 Notice of Apparent Liability, finding KIEV in apparent violation of § 317(a)(1) of the Communications Act and § 73.1212(a) of the Commission's Rules. KIEV requested mitigation of the forfeiture, based on the station's attempts to comply with the law, and contending that the forfeiture was an unnecessarily "severe penalty" for the particular infractions involved. The Bureau rejected KIEV's arguments and issued the $10,000 Forfeiture Order, which KIEV now challenges.

3. KIEV again requests reduction of the forfeiture, based largely upon the same arguments advanced before the Bureau, *i.e.*, the "inadvertent" nature of the violation; the licensee's "good faith" attempt to comply with the statute; and the Bureau's "unduly harsh" treatment of KIEV as compared to forfeitures for similar violations. First, KIEV argues that forfeiture mitigation is warranted when a licensee's violation is inadvertent, which is how KIEV characterizes its own violation. By "inadvertent," the licensee explains that it "endeavored in good faith to ensure compliance with the sponsorship identification rules" by introducing Richard Epstein as "Your Info Talk show host" and concluding with "This has been an Info Talk Program -- an Eppie Production," and identifying "The Investors Club of the Air" as the "Buz Schwartz Program." What KIEV characterizes as "inadvertence," however, is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance. *Vernon Broadcasting, Inc.*, 60 RR 2d 1275, 1277 (1986); *Fay Neel Eggleston*, 19 FCC 2d 829 (1969). Nor does this constitute a "good faith" effort to comply with Section 317. We stated over 25 years ago that announcements of the type used by KIEV were insufficient. *United Broadcasting Co. of New York, Inc.*, 4 RR 2d 167, 172 (1965)("this has been a Pam Cal production" does not comply with Section 317).[1] Even if this were a good faith attempt, it was an unreasonable interpretation of the law, in view of the *United Broadcasting* case. *Rex J. Jensen*, 3 FCC Rcd 1779 (1988). We agree with the Bureau that these tag lines gave the public no indication that an outside party paid consideration for the broadcast of the entire program. We need not find that the licensee intended to mislead the public, or that the public was indeed misled, to find a sponsorship identification violation. *Lakewood Broadcasting Service, Inc.*, 37 FCC 2d 437 (1972). KIEV's argument ignores the fact that forfeitures were authorized ". . . to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations are operated in substantial compliance with their licenses and the Commission's Rules." *Crowell-Collier Broadcasting Corporation*, 44 FCC 2444, 2449 (1961).

4. The cases cited by KIEV in support of mitigation are distinguishable, in that the violations involved mistakes of fact, not ignorance of the law, and in most cases, involved unavoidable circumstances. *See, e.g., Vernon Broadcasting, Inc., supra* (licensee had checked fencing shortly before FCC inspection and could not have been aware of the subsequent damage). Nor is this a situation where the rule had been modified recently, and the licensee lacked actual knowledge of the rule change, as in *United States v. Daniels*, 418 F. Supp. 1074 (D.S.D. 1976). Congress added Section 317(a)(1) in its present form to the Communications Act in 1960,[2] and, as noted above, the Commission ruled in 1965 that an announcement almost identical to that aired by KIEV did not comply with the law.

5. KIEV relies, however, on the Minnesota District Court's opinion in *U.S. v. Midwest Radio-Television, Inc.*, 249 F. Supp. 936, 937 (D.Minn. 1966). In that case, the court concluded that the licensee's sponsorship identification violation, as unintentional and unwitting, was not "willful" under Section 503(b). That opinion, however, preceded the 1982 amendment to the Communications Act, which clarified the meaning of the term "willful." 47 U.S.C. § 312(f)("'willful'. . . means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate" the Act or Commission rules). The Conference Report to that amendment stated: "[W]illful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." H.R. Rep. No. 97-765, 97th

Cong. 2d Sess. 51 (1982). The Conference Report also makes clear that this definition applies to Section 503 as well as Section 312; indeed, it specifically notes Congress's intent that the definition is consistent with the Commission's decision in *Midwest Radio-Television, Inc.*, 45 FCC 1137 (1963), which the District Court refused to enforce in the decision cited by KIEV. *See id.* at 50-51. Thus, consistent with congressional intent, recent Commission interpretations of "willful" do not require licensee intent to engage in a violation. *See MCI Telecommunications Corp.*, 3 FCC Rcd 509, 514 n.22 (1988)(subsequent history omitted); *Hale Broadcasting Corporation*, 79 FCC 2d 169, 171 (1980). [3] In any event, the *Midwest* violation consisted of two isolated broadcasts of one-minute spots in a single day, as opposed to the airing here of what were essentially program-length commercials for months on end. 45 FCC at 1138. Even if we were to accept KIEV's argument that its conduct was not "willful," it was nevertheless "repeated" because it happened on more than one occasion. *Hale Broadcasting Corporation*, 79 FCC 2d at 171. The statute requires only that the conduct be either willful *or* repeated. 47 U.S.C. § 503(b)(1)(B).

6. The gravamen of KIEV's argument is that the $10,000 fine is disproportionate to the gravity of the violation. However, KIEV is wrong when it claims that the Commission or the Bureau assess substantial fines only when the licensee has engaged in fraudulent or otherwise "egregious" conduct. For example, the Bureau issued a $10,000 forfeiture in a recent case involving the lack of sponsorship identification for repeated broadcasts of program-length commercials. *39 Broadcasting Ltd. (WDZL (TV), Miami, Florida)*, dated November 8, 1988 (MMB)(Section 317 violations for broadcasts of "Discover," a program-length commercial for "Helsinki Formula"). KIEV attempts to distinguish *39 Broadcasting Ltd.* as a case in which the Bureau found a deliberate, conscious effort by the licensee to confuse the viewer. KIEV has misinterpreted that case. The Bureau, in refuting that licensee's argument that the commercial content of the program was "clear" under Section 73.1212(f), found only that the program itself was intentionally presented in a manner that could have led to public confusion as to whether it was a commercial. The Bureau made no finding of the *licensee's* intention to confuse or mislead the audience. The same reasoning applies here, as listeners to KIEV could not have been expected to realize that either "Investors Club of the Air" or "Travel Talk" were paid-for programs, without proper identification. Thus, there is ample precedent for forfeitures of the type imposed against KIEV for sponsorship identification violations that do not result from licensee fraud or deliberate misrepresentation.

7. KIEV also points out that in *Liability of Money Radio Inc.*, released July 16, 1990 (MMB), radio station KMNY(AM), which is owned by Edward (Buz) Schwartz, the individual associated with the "Investors Club of the Air," was fined $10,000 for the identical sponsorship identification violation, even though it had notice (from the KIEV Notice of Apparent Liability) that such conduct would violate the law, and that the station violated a number of other Commission rules as well. We reject, however, KIEV's attempt to make a violation-by-violation comparison with the *Money Radio* case, as the Communications Act does not require the Commission to attribute monetary liability to each separate violation. *Niagara Frontier Broadcasting Corp.*, 51 FCC 2d 525 (1975). The Commission has great discretion under Section 503 as to the amount of a forfeiture based on its analysis of all relevant factors, such as the seriousness of the violation, circumstances under which it was committed, and its duration. *Triple X Broadcasting Co., Inc.*, 46 RR 2d 788, 789 (B/c Bur. 1979), *citing Brennan Broadcasting Co.*, 25 FCC 2d 400 (1970). Moreover, the Commission "is not bound to deal with all cases at all times as it has dealt with some that appear comparable." *Triple X Broadcasting, supra, citing Continental Broadcasting Co. v. FCC*, 439 F.2d 580 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971). In any event, the sponsorship identification violations here and in *KMNY* only appear similar, because they both involve the same program, "Investors Club of the Air." The nature of KIEV's violations (failure to identify entire paid programs, as opposed to *KMNY's* paid appearances of guests), and the number of different programs involved, (two as opposed to *KMNY's* one) provide a sufficient basis to justify the imposition of the same forfeiture amount as on KMNY, even taking into account KMNY's additional violations of our technical rules. For these reasons, KIEV's forfeiture will not be reduced.

8. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review IS DENIED.

9. IT IS FURTHER ORDERED That Southern California Broadcasting Company, licensee of station KIEV(AM), Glendale, California, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of ten thousand dollars ($10,000) for willful and repeated violations of Section 317(a)(1) of the Communications Act and Section 73.1212(a) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We note that the *United Broadcasting* case also involved the purchase of time pursuant to a "time brokerage arrangement." However, because the producer/broker in *United Broadcasting* did not resell the purchased time, as perhaps had been envisioned, its identification as sponsor was required, because the time was its exclusive property. 4 RR 2d at 172. Although KIEV describes the "Investors Club of the Air" as a "brokered program," KIEV acknowledges that Investors Club of the Air was the program's actual sponsor and should have been identified.

[2] H.R. Rep. No. 1800, 86th Cong., 2d Sess. 19 (1960).

[3] For the same reasons, KIEV's reliance on *McLendon Broadcasting Corp.*, 5 FCC 2d 855 (1966), is misplaced, because it employs a definition of "willful" that has long since been abandoned by the more recent Commission cases cited above.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 17, 1991

LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

Several local exchange carriers (LECs) filed proposed revisions to their permanent cost allocation manuals for the separation of regulated and nonregulated costs for the quarter ended June 30, 1991. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech Operating Companies	AAD 91-31
Bell Atlantic	AAD 91-32
BellSouth Corporation	AAD 91-33
Centel Corporation	AAD 91-34
Cincinnati Bell Telephone Company	AAD 91-35
GTE	AAD 91-36
Lincoln Telephone	AAD 91-37
Nevada Bell	AAD 91-38
NYNEX Telephone Companies	AAD 91-39
Pacific Bell	AAD 91-40
Rochester Telephone	AAD 91-41
Southern New England Telephone Company	AAD 91-42
Southwestern Bell	AAD 91-43
United Telephone	AAD 91-44
U S West, Inc.	AAD 91-45

Parties may file comments on the proposed revisions to the cost manuals no later than August 9, 1991. Replies should be filed by August 26, 1991. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Debbie Weber, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Debbie Weber, (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, Complainant,

File No. E-89-146

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, Defendant.

ORDER

Adopted: July 8, 1991; **Released: July 17, 1991**

By the Commission:

1. The Public Service Commission of the District of Columbia (the D.C. PSC) has advised that it does not intend to prosecute further its complaint against The Chesapeake and Potomac Telephone Company (C&P) in the above-captioned matter.[1] For reasons discussed below, we dismiss the complaint and vacate our decision in this matter which we previously had stayed.[2]

2. In its complaint, filed on May 3, 1989, the D.C. PSC alleged that C&P's end-user access charge or subscriber line charge that was in effect between January 1, 1988 and March 31, 1989 for C&P's multi-line business customers was established on the basis of "erroneous" projections and was "excessive" in violation of Section 69.104(c) of our rules, 47 C.F.R. § 69.104(c), [3] and Section 201 of the Communications Act, 47 U.S.C. § 201. [4] The D.C. PSC sought an order directing C&P to give its customers a credit because of the alleged excessive subscriber line charge. C&P denied any violation of the Act and of our rules and maintained that the forecasts on which its superseded subscriber line charges had been based were reasonable and accurate when made.

3. In the the *MO&O*, we found that the record contained no evidence that C&P had acted either negligently or in bad faith in projecting the number of subscriber lines or the revenue requirement for the base factor portion of the common line category for 1988. Accordingly, we rejected the D.C. PSC's claim that C&P had violated Section 69.104(c) of our rules merely because C&P's multi-line business subscriber line charge had been based on projected revenue requirements or costs that differed from the actual costs subsequently reported. [5] Moreover, because the D.C. PSC had not offered persuasive evidence of the unreasonableness of the multi-line business subscriber line charge, we found that it had "not sustained its burden of showing that the forecasts about which it complains were so unreasonable as to render the rates in violation of Section 69.104(c) of the rules or that the rates were unjust and unreasonable under Section 201 of the Communications Act." [6] However, in so concluding, the pendency of a motion by the D.C. PSC to compel more specific responses to certain relevant interrogatories was inadvertently overlooked. Accordingly, we stayed the effectiveness of our *MO&O*, granted said D.C. PSC motion and reopened the proceeding for the limited purpose of receiving the factual information called for which we directed. C&P to file. [7] C&P timely filed the required information on April 8, 1991.

4. In light of the D.C. PSC's May 10 letter stating that it does not intend to prosecute further its complaint, we conclude that dismissal of the complaint and vacation of the underlying order will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

5. Accordingly, IT IS ORDERED that the complaint filed by the Public Service Commission of the District of Columbia on May 3, 1989, in the above-captioned proceeding IS DISMISSED.

6. IT IS FURTHER ORDERED that our Memorandum Opinion and Order, FCC 90-301, released September 13, 1990, in this proceeding, 5 FCC Rcd 5518 (1990), as modified on reconsideration, 6 FCC Rcd 1418 (1991), IS VACATED. [8]

7. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

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[1] Letter from Howard C. Davenport to Mary Beth Hess (May 10, 1991).

[2] Public Service Comm. of D. C. v. C. & P. Tel. Co., 5 FCC Rcd 5518 (1990) (*MO&O*),*modified and stayed on reconsideration*, 6 FCC Rcd 1418 (1991) (*Recon. Order*).

[3] 47 C.F.R. § 69.104 requires carriers providing local exchange or Centrex telephone service (LECs) to establish a monthly single-line rate or charge for end-users subscribing to such service for each line between the end-user's premises and the carrier's Class 5 office. Section 69.104(c) provides that, subject to certain ceilings prescribed elsewhere in the rules, the single-line rate or charge shall be computed by dividing one-twelfth of the projected annual revenue requirement for the end-user common line element by the projected average number of local exchange service subscriber lines in use during such annual period. Various other rules in Part 69 prescribe the method for apportioning LEC costs among the various access elements described therein, including the end-user common line element.

[4] 47 U.S.C. § 201 provides, in pertinent part, that all charges, practices, classifications, and regulations for and in connection with common carrier interstate or foreign communication by wire or radio shall be just and reasonable.

[5] *MO&O*, *supra*, 5 FCC Rcd at 5519.

[6] *Id.*

[7] *Recon. Order*, 6 FCC Rcd at 1419.

[8] In the case before us, we specifically stayed the effectiveness of the underlying order pending our further order. *Id.*

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-216

In the Matter of

Amendment of Section 73.202(b), RM-7742
Table of Allotments,
FM Broadcast Stations.
(Camas, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 5, 1991; Released: July 17, 1991

Comment Date: September 9, 1991
Reply Comment Date: September 24, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KMAS Broadcasting Corporation ("petitioner"), permittee of Station KMUZ(FM), Channel 234A, Camas, Washington, requesting the substitution of Channel 234C3 for Channel 234A at Camas and the modification of its construction permit to specify operation on the higher powered channel. Petitioner failed to state its intention to apply for the channel, if allotted, and must do so in comments responsive to this *Notice*.

2. We believe the public interest would be served by proposing the substitution of Channel 234C3 for Channel 234A at Camas, Washington, since it could provide the community with a wide coverage area FM service. Channel 234C3 can be allotted to Camas in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site with a site restriction of 19.1 kilometers (11.9 miles) east of the community. [1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 234C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 234C3 at Camas or require the petitioner to demonstrate the availability of an additional equivalent class channel. Since Camas is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Camas, Washington	234A	234C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 9, 1991,** and reply comments on or before **September 24, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard L. Schwary, President
KMAS Broadcasting Corporation
P.O. Box 1155
Camas, Washington 98607
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 234C3 at Camas are North Latitude 45-31-39 and West Longitude 122-10-17.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-217

In the Matter of

Amendment of Section 73.202(b), RM-7751
Table of Allotments,
FM Broadcast Stations.
(Brainerd, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 5, 1991; Released: July 17, 1991

Comment Date: September 9, 1991
Reply Comment Date: September 24, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Greater Minnesota Broadcasting Corporation ("petitioner") seeking the allotment of FM Channel 278A to Brainerd, Minnesota, as that community's third FM broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a third FM broadcast service to Brainerd, Minnesota. Channel 278A can be allotted to Brainerd in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Brainerd, Minnesota, is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence will be requested for this allotment.

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Brainerd, Minnesota	294C1, 298C1	278A, 294C1, 298C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 9, 1991,** and reply comments on or before **September 24, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

June A. Persons
Greater Minnesota Broadcasting Corporation
KVBR Building
Brainerd, Minnesota 56401
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 278A are 46-21-36 and 94-12-06.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-218

In the Matter of

Amendment of Section 73.202(b), RM-7752
Table of Allotments,
FM Broadcast Stations.
(Charleston, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 5, 1991; Released: July 17, 1991

Comment Date: September 9, 1991
Reply Comment Date: September 24, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Dianne Anderson ("petitioner"), requesting the substitution of Channel 291C2 for Channel 291A at Charleston, Missouri. [1] Petitioner also requests modification of her construction permit (BPH-880324OG) for Station KWKZ, Channel 291A, to specify operation on Channel 291C2.

2. We believe petitioner's proposal warrants consideration. Channel 291C2 can be allotted to Charleston, Missouri, consistent with the Commission's spacing requirements, at petitioner's specified site 18.5 kilometers (11.5 miles) west of the community. [2] The grant of a license for Channel 291C2 at Charleston may be withheld until Station KMIS-FM, Channel 292A, Portageville, Missouri, is licensed on Channel 293C2 at New Madrid, Missouri. We shall also propose to modify the construction permit for Station KWKZ, Channel 291A, to specify operation on Channel 291C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 291C2 for Channel 291A at Charleston, Missouri, since it could provide the community with a wide coverage area station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Charleston, Missouri	291A	291C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 9, 1991,** and reply comments on or before **September 24, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Anne Thomas Paxson
Borsari & Paxson
2033 M Street, N.W.
Suite 630
Washington, D.C. 20036
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] Petitioner initially requested the Charleston substitution in a counterproposal filed in MM Docket 91-43, 6 FCC Rcd 1321 (1991). The counterproposal was unacceptable because petitioner failed to file a required reimbursement statement. In reply comments, petitioner provided a solution to accommodate her upgrade which removed the reimbursement issue. Therefore, due to the interest in expanding service in the Charleston area, we have accepted the reply comments as a new petition for rule making.

[2] The coordinates for Channel 291C2 at Charleston are 36-56-30 and 89-33-00.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-43

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-7607
FM Broadcast Stations.
(Portageville and New Madrid,
Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 5, 1991; Released: July 17, 1991

By the Chief, Allocations Branch:

1. At the request of New Madrid Broadcasting Company ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1321 (1991), proposing the substitution of Channel 293C2 for Channel 292A at Portageville, Missouri, the change of community of license for the channel from Portageville to New Madrid, Missouri, and modification of the license for Station KMIS-FM to specify operation on Channel 293C2 at New Madrid. Petitioner filed comments and reply comments stating its intention to apply for Channel 293C2 at New Madrid. W. R. Phillips, Jr., Mayor of New Madrid, filed comments supporting the reallotment of the channel from Portageville to New Madrid. Diane Anderson ("Anderson"), permittee of FM Station KWKZ, Channel 291A, Charleston, Missouri, filed a counterproposal. [1]

2. We believe the public interest would be served by substituting Channel 293C2 for Channel 292A and reallotting the channel from Portageville to New Madrid, Missouri, and modifying Station KMIS-FM's license to specify Channel 293C2 at New Madrid. Petitioner has shown that the reallotment of the channel from Portageville to New Madrid will result in a preferential arrangement of allotments. New Mardid (population 3,204)[2] would receive its first local aural transmission service. In addition, Portageville (population 3,470) will continue to receive local transmission service from Station KMIS-AM.

3. Channel 293C2 can be allotted to New Madrid, Missouri, in compliance with the Commission's minimum distance separation requirements at the current transmitter site for Station KMIS-FM.[3] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station KMIS-FM to specify New Madrid, Missouri, as its community of license on Channel 293C2, in lieu of Channel 292A at Portageville, Missouri.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
New Madrid, Missouri	293C2
Portageville, Missouri	---

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KMIS-FM, Portageville, Missouri, IS MODIFIED to specify operation on Channel 293C2 in lieu of Channel 292A at New Madrid, Missouri, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

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[1] Anderson's counterproposal, although timely filed, is unacceptable in this proceeding. Anderson proposed the substitution of Channel 291C2 for Channel 291A, Charleston, which required the substitution of Channel 293A for Channel 292A, New Madrid. Anderson failed to indicate a willingness to reimburse the licensee of Station KMIS-FM for expenses involved in changing channels. *See Circleville, Ohio*, 8 FCC 2d 159 (1967), and *Dickerson, Tennessee, and Benton and Calvert City, Kentucky*, 4 FCC Rcd 8707 (1989).

In reply comments Anderson provided a solution to accommodate upgrades at New Madrid and Charleston by allotting Channel 291C2 at Charleston at a different site than was proposed in her counterproposal. We have determined that Channel 291C2 can be allotted to Charleston, Missouri, at Anderson's revised site, in compliance with the Commission's spacing requirements. Therefore, because of the interest expressed in expanding service in the Charleston, Missouri area, we will issue a *Notice of Proposed Rule Making* proposing the substitution of Channel 291C2 for Channel 291A, Charleston, and modification of the construction permit for Station WKKZ to specify operation on the higher class channel.

[2] Population figures are taken from the 1980 U.S. census.

[3] The coordinates for Channel 293C2 at New Madrid are 36-25-30 and 89-41-39.

6. IT IS FURTHER ORDERED, That the counterproposal filed by Dianne Anderson requesting the substitution of Channel 291C2 for Channel 291A, Charleston, Missouri, IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-163

In the Matter of

Amendment of Section 73.202(b),	RM-7170
Table of Allotments,	
FM Broadcast Stations.	
(Bay St. Louis and Poplarville,	
Mississippi)	

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: July 5, 1991; **Released: July 17, 1991**

By the Chief, Allocations Branch:

1. The Commission issued a *Notice of Proposed Rule Making*, 5 FCC Rcd 1913 (1990), in the above-captioned proceeding proposing to change the community of license for Channel 300C from Poplarville to Bay St. Louis, Mississippi and to modify the license of Station WZKX(FM), Channel 300C, accordingly, in response to a petition filed on behalf of Dowdy and Dowdy Partnership ("Dowdy"). Dowdy filed comments in support of its proposal.

2. As the *Notice* stated, Dowdy seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. Dowdy stated that the change of community would provide Bay St. Louis (population 7,891)[1] and surrounding Hancock County (population 24,537) with a first FM local transmission service, and a first full time local transmission service, as only Station WXGR(AM) is licensed to Bay St. Louis. Poplarville (population 2,562) would continue to be served by daytime only station WRPM(AM). Petitioner states that it does not propose to make any change in its existing transmitting facilities or its channel of operation. Petitioner states that operating from its present site with existing facilities, Station WZKX(FM) places a 3.16 mV/m or stronger signal over all of Bay St. Louis.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that Bay St. Louis is partially within the Biloxi-Gulfport, Mississippi Urbanized Area as defined by the United States Census. We question whether Bay St. Louis is deserving of a first local FM service preference, or whether Bay St. Louis should be credited with all of the aural services licensed to the Urbanized Area. Petitioner is requested to submit information sufficient to show that Bay St. Louis is deserving of such a preference. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990). No additional counterproposals may be submitted since an opportunity for the filing of counterproposals has been provided.

4. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Lawrence J. Bernard, Jr., Ward & Mendelsohn, P.C., 1100 17th Street, N.W., Suite 900, Washington, D.C. 20036 (Counsel for petitioner {Dowdy and Dowdy Partnership}).

5. Interested parties may file comments on or before **September 9, 1991** and reply comments on or before **September 24, 1991** and are advised to read the Appendix to the *Notice* in this proceeding for the proper procedures. Additionally, a copy of such comments should be served on petitioner's counsel, as follows:

Lawrence J. Bernard, Jr.
Ward & Mendelsohn, P.C.
1100 17th Street, N.W. , Suite 900
Washington, D.C. 20036
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Population figures are taken from the 1980 U.S. Census.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-7

In the Matter of

Amendment of Section 73.202(b),	RM-7592
Table of Allotments,	
FM Broadcast Stations.	
(Socorro, New Mexico)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 5, 1991; Released: July 17, 1991

By the Chief, Allocations Branch:

1. At the request of Don R. Davis and William H. Pace ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 587 (1991), proposing the allotment of Channel 225A to Socorro, New Mexico, as the community's second local FM service. Petitioners filed comments reiterating their intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 225A to Socorro, New Mexico, because it could provide the community with its second local FM service. Channel 225A can be allotted to Socorro in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] We recognize that the allotment of Channel 225A to Socorro conflicts with the presently licensed operation of Station KMXQ on Channel 224A at Socorro. However, the license of Station KMXQ has been modified to specify Channel 284C and the station has been issued a construction permit on the new channel (BPH-890406IF). *See* 3 FCC Rcd 2266 (1988). Therefore, issuance of a license for Channel 225A may be withheld until Station KMXQ is licensed on Channel 284. We will serve a copy of this *Report and Order* on the licensee of Station KMXQ. Mexican concurrence in the allotment of Channel 225A to Socorro has been received because the community is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Socorro, New Mexico	225A, 284C

4. The window period for filing applications will open on **September 4, 1991,** and close on **October 4, 1991**.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following: H&HSB Corporation,175 Highway 60 West, Socorro, New Mexico 87801.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 225A at Socorro are North Latitude 34-03-42 and West Longitude 106-53-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CYBERTEL CELLULAR
TELEPHONE COMPANY,
Complainant,

v. File No. E-89-136

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: June 13, 1991; Released: July 16, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a motion filed on May 29, 1991, by the complainant in the above-captioned proceeding, Cybertel Cellular Telephone Company (Cybertel), requesting leave to withdraw the complaint without prejudice due to what it describes as changed circumstances during the pendency of the proceeding. We have fully considered Cybertel's unopposed motion and grant the requested relief.

2. Accordingly, IT IS ORDERED, pursuant to the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motion to withdraw the above-captioned complaint without prejudice **IS GRANTED** and this proceeding **IS TERMINATED.**

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

Public Notice

Report No. DS-1104 **Released: July 11, 1991**

APPLICATION FOR TRANSFER OF CONTROL OF IDB COMMUNICATIONS, INC.

File Nos. 1465-DSE-TC-91(101); CSG-91-111(TC), ITC-91161(TC), and 124-92-CF-TC-(14)-91

Applications for authority to transfer control of IDB Communications Group, Inc., from Jeffrey P. Sudikoff (Voting Trustee) to The Shareholders of Common Stock of IDB Communications Group, Inc. have been found, upon initial review, to be acceptable for filing.

Comments or oppositions with respect to this application should be filed on or before 30 days following the date of this notice.

Copies of these applications are available for inspection in the Domestic Facilities Division, Public Reference Room 6220, located at 2025 M Street, NW and International Division Public Reference Room 533, located at 1919 M Street, NW, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 18, 1991

BELLSOUTH CORPORATION COMPANIES FILE APPLICATION FOR AUTHORITY TO MERGE

South Central Bell Telephone Company (South Central Bell) and Southern Bell Telephone and Telegraph Company (Southern Bell) have filed an application under Section 221(a) of the Communications Act, 47 U.S.C. § 221(a), and Sections 66.11-66.15 of the Commission's Rules, 47 CFR §§ 66.11-66.15, for authority to merge into a single entity. Applicants propose to merge, with Southern Bell as the surviving company. Applicants jointly own BellSouth Services, Inc. (BellSouth Services), which company will be merged into Southern Bell contemporaneously. The name of the surviving company, Southern Bell, will be changed to BellSouth Telecommunications, Inc. South Central Bell and Southern Bell are wholly-owned by BellSouth Corporation (BellSouth). South Central Bell provides telecommunications services to customers in Alabama, Kentucky, Louisiana, Mississippi, and Tennessee. Southern Bell provides telecommunications services to customers in Florida, Georgia, North Carolina, and South Carolina.

The application has been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return the application if, upon further examination, it is determined to be defective and not in conformance with the Commission's Rules or policies.

Parties wishing to comment on this matter may do so no later than thirty (30) days after release of this notice. Reply comments should be filed not later than fifteen (15) days thereafter. All filings concerning this matter should refer to File No. ENF-91-08. A copy of the application and any subsequently filed documents in this matter may be obtained from Downtown Copy Center, 1142 21st Street, N.W., Washington, D.C. 20036 and in Room 246 at 1919 M Street, N.W., Washington, D.C. 20036 (202) 452-1422. The application and documents are also available for inspection and copying in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554. For further information contact David Meyers at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sierra Telephone Company, Inc.,
Cascade Utilities, Inc., and The
Volcano Telephone Company

Motion for Extension of Time

ORDER

Adopted: June 26, 1991; Released: June 27, 1991

By the Chief, Common Carrier Bureau:

1. Sierra Telephone Company, Inc., Cascade Utilities, Inc., and the Volcano Telephone Company (Petitioners),[1] filed petitions for waiver of Part 69 of the Commission's Rules to permit Petitioners to tariff operator services under the Local Switching rate element and to assign costs associated with operator services directly to the access category. On June 14, 1991, the Commission released a Public Notice directing that comments be filed.

2. Petitioners, on June 18, 1991, filed a motion for extension of time in which to file comments and reply comments. Petitioners argue that the public notice established unusually short comment deadlines. They maintain that it will be difficult to obtain comments and draft a timely reply within those deadlines. On June 21, 1991, the Organization for the Protection and Advancement of Small Telephone Companies filed comments in support of the motion.

3. The Common Carrier Bureau has reviewed the motion for extension of time in which to file comments and has determined that additional time is needed to permit all interested parties to comment. Therefore, comments on petitioners' waiver motion will be due on July 12, 1991, and reply comments should be filed no later than July 19, 1991.

4. Accordingly, IT IS ORDERED that the motion for extension of time filed by Sierra Telephone Company, Inc., Cascade Utilities, Inc. and the Volcano Telephone Company, IS GRANTED to the extent specified herein and OTHERWISE IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Cascade Utilities, Inc., Petition for Waiver, filed Apr., 19, 1991; Sierra Telephone Company, Inc., Petition for Waiver, filed May 8, 1991; Volcano Telephone Company, Petition for Waiver, filed May 24, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-295

In re Applications of

SUSAN D. BROWN File No. BPH-880602OJ

PAMELA R. JONES File No. BPH-8806020L

For Construction Permit for a New
FM Station on Channel 287A, in
Roanoke, Virginia

Appearances

Christopher D. Imlay, Esq. on behalf of Susan D. Brown; *Michael J. Wilhelm, Esq.* on behalf of Pamela R. Jones; and *Charles E. Dziedzic, Esq.*, and *James W. Shook, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: July 12, 1991; Released: July 18, 1991

PRELIMINARY STATEMENT

1. This case went to hearing on May 15, 1991. On the day of hearing, a partial settlement was concluded between Susan D. Brown ("Brown") and a former applicant, Roanoke Radio Limited Partnership ("RRLP"). *See Order* FCC 91M-1653, released May 17, 1991 and *Order* FCC 91M-1681, released May 21, 1991. That leaves only Ms. Brown and Pamela R. Jones as contenders for the FM station allocated for Roanoke.

2. This decision will rule on the Motion For Summary Decision filed by Brown on June 7, 1991, and the Mass Media Bureau's Comments that were filed on June 21, 1991. There has been no Opposition filed by Jones. However, even with Jones' default in pleading, the preponderance of the evidence offered by Brown still must establish that Brown is the comparative winner. 47 C.F.R. §1.251.

FINDINGS OF FACT

Susan D. Brown

3. Brown is an individual, a United States citizen and a female. She will participate at least 40 hours per week on a daily basis, each week, in the day-to-day operation of her proposed station as General Manager. She will perform those duties normally associated with the position of General Manager in an FM broadcast station licensed to a market approximately the size of Roanoke, Virginia. She will establish all station policy and she will supervise and work with all station personnel. She will pay all bills and invoices, write checks and make all payroll payments. She will confer with legal counsel, engineering consultants and others. She will maintain community relations with minority and other groups in the area. (Brown Exh. 1 at 1-2).

4. Brown independently carried out all functions associated with prosecuting an application through litigation. (Brown, Tr. 71-72.) While she discussed matters with her husband, he had no participation in preparation or prosecution. (Brown, Tr. 78.) Brown's husband is a real estate developer and licensed real estate agent. At Brown's request, he contacted the agent for the site owner. (Brown, Tr. 80, 91.) But he did nothing more. Neither Brown nor her husband have any media interests. (Brown Exh. 1 at 3.) Brown is self-employed as a temporary clerical-office worker and she will give up that work when she receives the CP and begins construction.

5. Brown has lived in her service area for 21 years and in the county or city of Roanoke since 1970. She has three years of broadcast experience and she has performed significant civic activities. She will install auxiliary power at the station. (Brown Exh. 1 at 4; Brown, Tr. 62-70).

Pamela R. Jones

6. Jones has no interest in or connection with any medium of mass communications. (Jones Exh. 1.) She agrees to be bound by the determination on the merits of her financial qualifications in the Modesto, California proceeding (Docket 90-68). (Jones Exh. 2.) Jones does not propose to integrate herself into the management of the proposed Roanoke station. Therefore, she has not asserted any claim for enhancement as a female applicant. (Jones Exh. 3.) Jones proposes auxiliary power apparatus at both the studio and transmitter site of her proposed Roanoke station. (Jones Exh. 4.)

Comparative Coverage

7. By stipulation received into evidence, it was agreed that there are at least five existing, available full-time aural services in all areas proposed to be served by Brown and Jones. (Tr. 96.) Such evidence establishes that the parties would serve the following areas and populations:

Brown	971 square kilometers	201,054 persons
Jones	1,491 square kilometers	223,591 persons

Considering that the areas and populations within the applicants' proposed coverage areas are already well-served and that there is an 11% difference in coverage, Jones merits a very slight preference over Brown for comparative coverage. *Family Broadcasting Group*, 93 F.C.C. 2d 771, 779 (Review Bd 1983).

CONCLUSIONS OF LAW

8. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations of denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). Brown has the burden of establishing that summary decision would be appropriate based on the evidence submitted. *See Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). Brown is found to have sustained her burden. The evidence relied on includes her hearing testimony for which she was available for cross-examination.

9. Brown is entitled to 100% quantitative integration credit. Full quantitative integration credit is due where, as in this case, an individual application has set forth a specific integration proposal. Brown has adhered to that proposal and there is reasonable assurance that the plan will be carried out. *See Bradley, Hand and Triplett*, 89 F.C.C. 2d 657, 662 (Rev. Bd. 1982); *Pacific Television, Ltd.*, 3 F.C.C. Rcd 1700 (1987). Here, there is no doubt that Ms. Brown has the ability to perform her proposed role as full-time General Manager of her proposed station. She has held a management role at a broadcasting station before, and now has no conflicting contractual or other business commitments that would conflict with her full-time management proposal at the Roanoke station. *See, Poughkeepsie Broadcasting, Limited*, 5 F.C.C. Rcd 3374, 3380 (Review Bd 1990). By contrast, Jones has disavowed any claim for integration into the operation of her proposed station.

10. Brown has met her burden of proof on the comparative issue by proving her integration intention and the likelihood of carrying it out. Jones has completely failed on integration credit. While not essential to awarding the grant to Brown, it is further found that Brown merits preferences with respect to local residence, past broadcast experience, and civic activities. But her 100% integration is the factor of substantial importance. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965). Such credit cannot be outweighed by the very slight comparative coverage advantage which may be asserted by Jones. *See, Barton Broadcasting Co., supra* ; *Magdalene Gunden Partnership*, 63 Radio Reg. 2d (P&F) 1647, at 1655 (Review Bd 1987); *Northern Sun Corporation*, 100 F.C.C. 2d 889, 895 (Review Bd), *recon.* denied, 100 F.C.C. 2d 1440 (Review Bd 1985); *review denied*, FCC 86-135, March 28, 1986; *Cannon's Point Broadcasting Co.*, 93 F.C.C. 2d 643, at 656 (Review Bd 1983) (subsequent history omitted); *Richard P. Bott II*, 66 Radio Reg. 2d (P&F) 1075 (Review Bd 1989) (100 percent versus 0 percent integration outweighed, *inter alia*, slight to moderate comparative coverage preference).

RULINGS

IT IS ORDERED that the Motion For Summary Decision filed on June 7, 1991 by Susan D. Brown IS GRANTED and the comparative issue IS RESOLVED in favor of Susan D. Brown.

IT IS FURTHER ORDERED that the application of Pamela R. Jones (File No. BPH-880602OL) IS DENIED and the application of Susan D. Brown (File No. BPH-880602OJ) IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTE

[1] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY
WDIX, Yadkinville, North Carolina

File No. BP-870331BK

For a Construction Permit
for a Modification of Facilities

TRIAD INC. NETWORK,
Greensboro, North Carolina

File No. BP-870928AA

For a Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 1991; Released: July 18, 1991

By the Review Board: BLUMENTHAL and ESBENSEN. MARINO (Chairman) absent.

1. The Board has before it the Appeal of Triad Network, filed June 26, 1991, from the *Memorandum Opinion and Order*, FCC 91M-1929, released June 19, 1991 (*MO&O*), of Administrative Law Judge Edward J. Kuhlmann (ALJ). It also has before it the Opposition of Palmetto Communications, filed July 3, 1991.[1]

2. In his *MO&O*, the ALJ found that counsel for Triad, Stephen Yelverton of the firm of Maupin Taylor Ellis & Adams, had placed himself in a serious conflict of interest situation, such that the integrity of the remanded licensing proceeding[2] would be irreparably compromised unless Yelverton (and his firm) withdrew as counsel for Triad.

3. Despite the pendancy of its appeal before the Board, and without withdrawing that appeal, Triad, on July 1, 1991, filed with the ALJ a Notice of Appearance advising that Triad had retained "new counsel," specifically the firm of Blair, Joyce & Silva. It also filed a Notice that Yelverton (and his firm) have withdrawn as counsel for Triad. Under these circumstances, the Board will dismiss with prejudice Triad's now moot appeal. *See Law Offices of Seymour M. Chase* v. FCC, 843 F.2d 517 (D.C. Cir. 1988).

4. ACCORDINGLY, IT IS ORDERED, That the appeal of Triad Network, Inc., filed June 26, 1991 IS DISMISSED;[3] and

5. IT IS FURTHER ORDERED, That Triad Network, Inc.'s Motion for Leave to File and Motion to Disqualify Counsel, filed June 28, 1991, respectively, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Also before the Board is Triad's Motion to Disqualify Counsel, filed June 28, 1991, requesting that the Board declare that counsel for Palmetto suffers a conflict of interest and seeking the Board's removal of Palmetto counsel. Palmetto filed an Opposition to that Motion on July 3, 1991. For the reasons indicated in our text, the Board declines to take jurisdiction at this stage, and will dismiss Triad's Motion of June 28. Triad may, if it chooses, refile its motion with the ALJ, who has reacquired jurisdiction over this proceeding.

[2] *See Palmetto Communications Company*, 6 FCC Rcd 2193 (Rev. Bd. 1991). Therein, the Board had anticipated a potential conflict, *see id.*, at 2195 n.7.

[3] In order to avoid any further delay in the remanded licensing proceeding, pre-publication copies of the Board's instant order have been made available to counsel for the parties and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: July 19, 1991

Three Star Telecast, Inc. 8940-PUH
c/o Dr. Carlos J. Lastra-Gonzalez, Trustee
1785 Santa Eulalia Street
Sagrado Corazon
Rio Piedras, Puerto Rico 00926

International Broadcasting Corporation
c/o Pedro Roman Collazo
Penthouse Darlington Building
Rio Piedras, Puerto Rico 00925

Dear Applicants:

This letter is in reference to your application (BALCT-900709KL) seeking Commission consent to the assignment of the license of station WSJU-TV (Channel 18), San Juan, Puerto Rico, from Dr. Carlos J. Lastra-Gonzalez, ("Lastra"), Trustee for Three Star Telecast, Inc., ("Three Star"), to International Broadcasting Corporation ("International").

International is now the licensee of station WVOZ(FM), Carolina, Puerto Rico.[1] The acquisition of WSJU-TV by International will result in a television/radio combination where the Grade A contour of the television station encompasses the city of license of the radio station. Such television/radio combinations are generally proscribed by Section 73.3555(b) of the Commission's Rules. Accordingly, International has requested a waiver of the rule under the Commission's "failed station" standard.

In *Amendment of Section 73.3555*, 4 F.C.C. Rcd. 1741, *reconsidered in part*, 4 F.C.C. Rcd. 6489 (1989), we set out standards for reviewing requests for waivers of the rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more separately owned, operated, and controlled voices would remain after the proposed assignment. Second, we stated that we would look favorably upon requests involving "failed stations" that have not been operated for a substantial period of time or that are involved in bankruptcy proceedings. 4 F.C.C. Rcd. at 1751; *See* Section 73.3555, n. 7. Because Three Star is in Chapter 11 bankruptcy proceedings in the U.S. Bankruptcy Court for the District of Puerto Rico (Case No. 86-02022 (ESL)), it meets the "failed station" criteria. Accordingly, the request for waiver of Section 73.3555(b)(2) is granted.

We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the application (BALCT-900709KL) is granted, effective on the date of adoption of this letter.

This letter was adopted by the Commission on July 9, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

[1] Recently the Commission approved the acquisition of WTIN(TV), Ponce, Puerto Rico by International. *Hector Nicolau*, 5 F.C.C. Rcd. 6370 (1990). Had that acquisition been consummated, the Grade B contour of WSJU-TV would have overlapped that of WTIN(TV). Such overlap is generally prohibited by Section 73.3555(a) of the Commission's Rules. However, we were notified on December 20, 1990, that the WTIN(TV) assignment would not be consummated, which removes that potential conflict with the rule.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ORO SPANISH BROADCASTING, INC. File No. ARN-881229AD

For Construction Permit for
KIQI(AM), San Francisco, California

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1991; Released: July 19, 1991

By the Commission: Commissioner James H. Quello dissenting with a statement.

1. Oro Spanish Broadcasting, Inc. ("Oro"), licensee of KIQI(AM), San Francisco, California, has filed a petition requesting reconsideration of the action of October 5, 1990, by the Chief, Audio Services Division, Mass Media Bureau, returning Oro's amended application for construction permit (ARN-881229AD) as unacceptable for filing. The application was returned because of overlap between the proposed 25 mV/m nighttime groundwave signal contour of KIQI(AM) and the nighttime 2 mV/m signal contour of second adjacent channel KKIS(AM), Pittsburg, California, in violation of Section 73.37(a) of the Commission's rules.[1] Oro has resubmitted the subject application in connection with the instant petition.

2. At the time of its initial filing on December 29, 1988, the subject application proposed an increase in KIQI(AM)'s nighttime power from 0.5 kW to 1.1 kW.[2] Oro's application included a request for waiver of Sections 73.37(a) and 73.3571(d)(4) of the Commission's rules. [3] By letter dated September 24, 1990, Oro amended the subject application to request a reduction in nighttime power to 1 kW and a reduction in daytime power to 30 kW.[4] Oro reiterated its request for waiver of Sections 73.37(a) and 73.3571(d)(4) of the Commission's rules at that time. By letter dated October 5, 1990, the staff denied Oro's request for waiver of Section 73.37(a) and returned Oro's application as unacceptable for filing. The staff did not reach the merits of Oro's request for waiver of Section 73.3571(d)(4). On November 5, 1990, Oro filed the instant petition for reconsideration.[5] Oro contends that the staff's denial of Oro's request for waiver of Section 73.37(a) warrants reconsideration on the basis of circumstances unique to the nighttime operation of KIQI(AM).

DISCUSSION

3. Oro has requested waiver of Section 73.3571(d)(4) to permit the filing of its application for 1 kW nighttime power in advance of June 1, 1990. On March 29, 1990, we imposed a freeze on AM applications filed after April 5, 1990, rendering Oro's request for waiver of the June 1, 1990 date fundamental to the acceptability of its application. *See Review of the Technical Assignment Criteria for the AM Broadcast Service* (" *AM Freeze Order*"), 5 FCC Rcd 2136 (1990). The AM application freeze was imposed to avoid compounding the recognized difficulties associated with providing service on the AM band while the Commission is undertaking a comprehensive Rule Making proceeding looking towards improving the technical and operational integrity of the AM service as a whole. *Id.* Those proceedings are now actively under consideration. *See Review of the Technical Assignment Criteria for the AM Broadcast Service* (MM Docket 87-267), 5 FCC Rcd 4381 (1990). If not for our imposition of the AM application freeze pending completion of our AM improvement Rule Making, Oro could have filed the subject application on June 1, 1990. However, grant of Oro's request for waiver of Section 73.3571(d)(4) or, alternatively, waiver on our own motion of the AM application freeze, would be inconsistent with our stated objective of minimizing any further compounding of the difficulties in the AM band pending implementation of new AM technical rules.[6] We note in this regard that Oro's application falls within none of the exceptions specified in the *AM Freeze Order*.[7]

4. Even if we were to grant Oro's request for waiver of the June 1, 1990 date to allow early acceptance for filing of the subject application, we would not approve Oro's proposal because any increase in KIQI(AM)'s nighttime power will increase the overlap between KIQI(AM)'s 25 mV/m contour and the 2 mV/m contour of KKIS(AM) in violation of Section 73.37(a).[8] Oro contends that unique circumstances affecting the nighttime operation of KIQI(AM) and KKIS(AM) justify waiver of Section 73.37(a). Specifically, Oro asserts that KKIS(AM) provides nighttime service only to the extent of its 9.3 mV/m interference-free contour, and that the area between that contour and the station's 2 mV/m contour remains unserved by KKIS(AM). Oro therefore contends that rigid adherence to Section 73.37(a) in this instance would require KIQI(AM) to protect a wholly irrelevant contour of KKIS(AM), thereby depriving KIQI(AM) of the ability to provide interference-free service to most of its principal community at night. Oro cites *C. Alfred Dick*, 57 FCC 2d 1020 (1976), for support of its argument that underservice of a station's city of license constitutes a basis for waiver of Section 73.37(a). Oro contends that KIQI(AM)'s present inability to provide nighttime interference-free service to its principal community hinders the station's ability to serve as a source of news and emergency information to San Francisco's Spanish-speaking population. Oro also asserts that the increased area of received interference to KIQI(AM) as a result of the station's nighttime operation at 1 kW consists of mixed industrial and commercial areas largely unpopulated by KIQI(AM)'s nighttime audience. Oro observes that no adverse consequences have yet been attributed to the existing overlap received by KIQI(AM) from KKIS(AM), and affirms that KIQI(AM) will agree to take any steps necessary to eliminate adverse interference or intermodulation effects that would arise as a result of the operation of KIQI(AM) as proposed in the subject application.[9]

5. The circumstances cited by Oro as justification for waiver of Section 73.37(a) ignore several facts. We have previously considered and denied Oro's request for waiver of Section 73.37(a) in connection with an application filed by Oro proposing to increase KIQI(AM)'s nighttime power to 2 kW. *See KIQI (AM)*, 5 FCC Rcd 5140 (1990). In evaluating the proposal submitted by Oro at that time, we considered the circumstance Oro asserts as "unique," namely the location of the KIQI(AM) transmitter site

wholly within KKIS(AM)'s 2 mV/m nighttime contour, and determined that "any increase in power or signal intensity would only aggravate the existing overlapping of signals generally prohibited by Section 73.37(a) of the Commission's Rules." *Id.* at 5141. Nothing concerning the nighttime interaction of KIQI(AM) and KKIS(AM) has changed since our prior determination.[10] With respect to waiver of Section 73.37(a), the question presented by the proposed operation of KIQI(AM) at 2 kW is therefore analogous to that presented by the instant application. The only distinction lies in the extent of the area of received overlap, and hence the egregiousness of the interference prohibited under Section 73.37(a). *See Midwest Television, Inc.*, 2 FCC Rcd 215 (1987).[11]

6. We further find Oro's contention regarding underservice of its city of license similarly unavailing. In our *Report and Order* in MM Docket 84-281, we recognized that to apply our rules regarding nighttime city grade coverage to stations authorized to operate on foreign clear channels with nighttime power of 0.5 kW "would be impractical in light of the reduced nighttime power required to protect the full-time foreign and domestic cochannel stations and the limited flexibility that many daytime-only stations will have in designing new antenna systems." *See Nighttime Operation on Canadian, Mexican and Bahamian Clear Channels*, 58 RR 2d at 660.[12] We concluded that to insist that such stations comply with our coverage rules at night would "defeat the opportunity for new nighttime services." *Id.* Oro implicitly agreed to accept otherwise inadequate nighttime coverage of KIQI(AM)'s city of license when it accepted modification of KIQI(AM)'s license and commenced nighttime operation at 0.5 kW pursuant to the Show Cause Order in Docket 84-281.[13]

7. Finally, in applying broad standards intended to maintain the integrity of the AM allocation scheme as a whole, we do not consider allegations of specific programming benefits to be derived from a particular minority oriented station. *See ICBC Corporation*, 89 FCC 2d 447 (1982), *aff'd*, 716 F.2d 926 (D.C. Cir. 1983). In any event, there is no indication in this case that broadcast services already available in the San Francisco area are either unable or disinclined to provide essential emergency information to the Spanish-speaking audience of the public they are licensed to serve. Moreover, we do not consider the absence of interference complaints to be germane. If we were to rely on such indications, we would be giving undue weight to such ephemeral factors as listener habits and population distribution in establishing the appropriate allocation scheme for AM broadcasting. We therefore find no merit in Oro's argument that the absence of complaints regarding existing interference renders the proposed overlap insignificant. *See In re Audio House, Inc. (KCBQ (AM)*), 2 FCC Rcd 3171 (1987).

8. For all of the foregoing reasons, IT IS ORDERED, That, pursuant to 47 C.F.R. §1.106, the Petition for Reconsideration filed by Oro Spanish Broadcasting, Inc. IS DENIED.

9. IT IS FURTHER ORDERED, That the request of Oro Spanish Broadcasting, Inc. for special temporary authority to operate KIQI(AM) as proposed in its amended application for construction permit (ARN-881229AD) IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. §73.37(a) provides, *inter alia*, that no application will be accepted for a change of facilities of an existing station if the proposed change would involve overlap between the proposed 25 mV/m signal strength contour and the 2 mV/m contour of any second adjacent channel station.

[2] The subject application, ARN-881229AD, seeks to modify the facility authorized in a construction permit granted to Oro on August 18, 1988 (BP-880617AA), which authorized KIQI(AM) to operate with power of 0.5 kW nighttime and 50 kW daytime. The application was one of a series of attempts by Oro to change its facilities through applications, amendments, supplements and requests for dismissal filed between June 17, 1988 and September 24, 1990. In a Commission By Direction letter released August 13, 1990, the subject application reference number was inadvertently included in the caption and dismissed as a supplement to the petition for reconsideration denied in that letter. *See KIQI (AM)*, 5 FCC Rcd 5140 (1990). In fact, ARN-881229AD is a separate application, not a supplement or amendment associated with the application treated in the Commission's By Direction letter. Accordingly, we now treat the application separately and on its merits.

[3] 47 C.F.R. §73.3571(d)(4) sets forth the stages pursuant to which certain classes of AM stations may apply for nighttime power increases. Class II-C stations operating on the frequency 1010 kHz were permitted to file applications to increase their nighttime power to 1 kW beginning June 1, 1990. *See* 47 C.F.R. §73.3571(d)(4)(i). Because KIQI(AM) operates on the frequency 1010 kHz, Oro's filing in advance of June 1, 1990 necessitates its request for waiver of Section 73.3571(d)(4)(i).

[4] Oro had earlier filed this proposed change as an amendment to a then-pending application seeking to increase KIQI(AM)'s nighttime power to 5 kW and change the station's nighttime transmitter location (ARN-900226AC). Oro withdrew that application and a related application proposing a change in daytime transmitter location (BMP-900226AD) simultaneously with the filing of its September 24, 1990 amendment.

[5] On November 7, 1990, Oro filed a supplement to the petition requesting special temporary authority to operate KIQI(AM) as proposed in its resubmitted application pending action on its reconsideration request. Given our action here, that request will be dismissed as moot.

[6] Although Oro has not requested waiver of the AM application freeze, we have considered such waiver on our own motion.

[7] The *AM Freeze Order* provides exceptions for the filing of certain categories of applications: applications mutually exclusive with renewal of license applications of existing stations; applications, timely filed in response to cut-off notices and mutually exclusive with applications tendered for filing on or before April 5, 1990; and applications for minor changes necessitated by circumstances beyond the control of an applicant. *See AM Freeze Order, supra.*

[8] Any nighttime operation by KIQI(AM) results in overlap of KIQI(AM)'s 25 mV/m contour and the KKIS(AM) 2 mV/m contour, generally prohibited by Section 73.37(a). The present

overlap between KIQI(AM) and KKIS(AM) results from Oro's election to operate KIQI(AM) at night with a power of 0.5 kW pursuant to Show Cause Order in Docket No. 84-281. *See Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels* (MM Docket 84-281), 58 RR 2d 655 (1985), *recon. denied in part*, 59 RR 2d 1187 (1986). MM Docket 84-281 authorized a group of stations operating on foreign clear channels to commence nighttime operation at 0.5 kW, thereby creating otherwise prohibited overlap in certain cases in order to afford nighttime service previously unavailable. An increase in nighttime power by KIQI(AM) would exacerbate the existing overlap and thereby increase the potential for interference to listeners of KKIS(AM).

[9] Oro's consulting engineer observes that intermodulation would not result in listener confusion because KIQI(AM) broadcasts in Spanish while KKIS(AM) broadcasts in English.

[10] Oro's request is patently inconsistent with the Commission's current effort to reduce AM interference. *See Review of the Technical Assignment Criteria for the AM Broadcast Service* (MM Docket 87-267), 5 FCC Rcd 4381 (1990). In the *Notice of Proposed Rule Making* initiating our review in Docket 87-267, we stated our intention "to revise our standards to force a reduction in the interference AM licensees face in their primary service areas." *See* 5 FCC Rcd at 4384. Grant of Oro's request for waiver of Section 73.37(a) would thus prove incongruous with our effort to improve the technical integrity of the AM service as a whole.

[11] Oro errs when its states that KKIS(AM) does not provide service at night outside its 9.3 mV/m contour. The value of that particular contour was obtained by applying the method specified in 47 C.F.R. §73.182(l); it is a measure of the effect that fluctuating skywave signals will have on a groundwave signal, and is a factor in calculations that are used to evaluate and control interference. Listeners inside the 9.3 mV/m contour should experience objectionable skywave interference less than 10% of the time, whereas listeners outside the 9.3 mV/m contour should experience objectionable skywave interference more than 10% of the time. The word "objectionable" means that the interference exceeds a specified value and that the quality of the service is reduced accordingly. It does not mean that service outside the 9.3 mV/m contour is rendered unusable. In contrast, interference by a groundwave signal, as is the case here, would cause objectionable interference 100% of the time. Not only would this groundwave interference compound the skywave interference but it would be more destructive within the area of overlap.

[12] 47 C.F.R. §73.24(j), which requires that an AM station's nighttime interference-free contour encompass the entire principal community to be served, exempts Class II-C stations such as KIQI(AM) from the nighttime coverage requirement. *See* 47 C.F.R. §73.24(j)(2).

[13] Our decision in *C. Alfred Dick*, 57 FCC 2d 1020 (1976), is inapposite. In that case we waived Section 73.37(a) to permit the applicant station to increase its power after a merger between the station's principal community and another community reduced the station's coverage of its new community of license to slightly more than 50%, thereby rendering its principal community coverage "patently inadequate." *Id.* No similar mitigating consideration, occasioned by circumstances beyond the control of the applicant, is present in this case. Moreover, the staff has determined that KIQI(AM)'s licensed nighttime interference-free contour encompasses approximately 80% of the city of San Francisco. While such coverage is less than would be required by Section 73.24(j), we cannot say that it is "patently inadequate." *See also Salter Broadcasting Company*, 88 FCC 2d 1197 (1982) (waiver of Section 73.37(a) granted to allow applicant to increase power after growth of principal community rendered station's coverage thereof patently inadequate).

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Application of ORO Broadcasting, Inc., for Construction Permit for KIQI(AM), San Francisco, California.

I am dissenting to the majority decision to deny the Petition for Reconsideration filed by ORO Broadcasting, Inc. In its Petition, ORO Broadcasting sought review of action by the Chief, Audio Services Division, Mass Media Bureau, that returned ORO's amended application for a construction permit. The overlap between the proposed 25 mV/m nighttime groundwave signal contour of KIQI(AM) and the nighttime 2 mV/m signal contour of second adjacent channel KKIS(AM), Pittsburg, California, was found to be in violation of Section 73.37(a) of the Commission's rules.

I recognize the need to maintain the integrity of broadcast signals and the need to assure that licensees can operate without increased or undue interference. At the same time, however, there are other compelling reasons for granting waivers of our rules. One such compelling reason is the availability of information in times of emergencies. KIQI(AM) provides Spanish language programming and information to its listeners. In times of emergencies, the ability to provide information to the thousands of Spanish speaking residents located within KIQI's listening area is essential not only for personal safety, but also for providing knowledge about the emergency itself and the precautions that should be taken.

Rather than dismissing ORO's Petition for Reconsideration, I would have preferred that the Bureau grant ORO Broadcasting, Inc. special temporary authority to determine the effects of its proposed amendments. In the event that interference was not detected, I would grant ORO Broadcasting its request. For these reasons, I dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCOM, L.P. File No. CSG-91-099-ML

For Modification of
Transborder Authority for
Transmit/Receive Earth
Station (E890928) at
Miami, Florida

ORDER AND AUTHORIZATION

Adopted: July 11, 1991; Released: July 19, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application filed pursuant to Title III of the Communications Act of 1934, as amended, IT IS ORDERED that the application IS GRANTED and TCOM, L.P. is authorized to add High Rock, Bahamas and other locations in the Bahamas to be subsequently determined as points of communications for its transmit/receive earth station at Miami, Florida (E890928) for the provision of service to the U.S. Coast Guard between the U.S. and the Bahamas.

2. IT IS FURTHER ORDERED that the authorization to serve other locations in the Bahamas which may subsequently be determined is conditioned on the Commission being notified by the State Department that the provision of service to such additional locations is solely for national security purposes within the meaning of Article XIV(g) of the INTELSAT Agreement.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access Tariff Filings

ORDER

Adopted: July 12, 1991; Released: July 19, 1991

By the Chief, Common Carrier Bureau:

1. On June 3, 1991, the GTE Service Corporation (GTOC) and its affiliated domestic telephone operating companies filed a motion for further extension of time to effectuate refunds ordered in the above-captioned proceeding until reconsideration and review of the matter is completed. The motion is unopposed.

2. In the *December 1988 Order*,[1] the Commission concluded that the GTOCs had applied an incorrect interpretation of the Commission's jurisdictional separations rules in computing circuit equipment revenue requirements with respect to Central Office Equipment (COE) Category 4.23 investment. In the *March 1990 Order*, the Commission directed the GTOCs to make refunds totalling approximately $1.01 million to interstate customers based upon each customer's share of 1988 local transport payments. These refunds were to be made within 30 days of the release of the Order.

3. On April 20, 1990, the GTOCs filed a motion to delay payment of the refunds until the Commission and the United States Court of Appeals for the District of Columbia Circuit have completed their final review of the *December 1988 Order*, and until the Commission ruled on the petition for reconsideration of the *March 1990 Order* the GTOCs planned to file.[2] The Common Carrier Bureau granted this request for extension of time for making refunds and a subsequent request for a similar extension. [3]

4. The Bureau has reviewed GTOC's motion and concluded that it is in the public interest to delay the deadline for refunds GTOC is required to make while this matter is under review. This grant is contingent upon GTOC's continuing compliance with the conditions set forth in the *September 1989 Order*.[4]

5. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), GTE Service Corporation and its affiliated domestic telephone operating companies ARE GRANTED an extension of time until the reconsideration of the *March 1990 Order* is decided by the Commission. Grant of this extension is contingent upon GTOC's continuing compliance with the conditions set forth in the *September 1989 Order*.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, 4 FCC Rcd 4115 (1988) (*December 1988 Order*), *recon.*, 4 FCC Rcd 3965 (1989) (*April 1989 Order*). *See also* Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Order, 4 FCC Rcd 7594 (1989) (*September 1989 Order*); Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Order, 5 FCC Rcd 2150 (1990) (*March 1990 Order*).

[2] *See* Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Petition for Reconsideration, filed April 30, 1990 by GTE Service Corporation.

[3] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Order, 4 FCC Rcd 2885 (1990). *See also* Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Order, 5 FCC Rcd 6004 (1990).

[4] The *September 1989 Order* instructed the GTOCs to place $7.3 million, plus interest accrued, in an interest bearing escrow account, and to provide the Commission with written documentation demonstrating that they had deposited these funds in such account.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-275

In re Applications of

JULIA S. ZOZAYA	File No. BPH-860703MI
FLAGSTAFF BROADCASTING FOUNDATION	File No. BPH-860707NQ
FLAGSTAFF BROADCASTING PARTNERSHIP	File No. BPH-860707OC

For a Construction Permit
for a New FM Station in
Flagstaff, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1991; Released: July 19, 1991

By the Commission:

1. Before the Commission for consideration is a Commission memorandum opinion and order upholding a Review Board decision granting the application of Flagstaff Broadcasting Partnership (FBP) and denying the competing applications of Julia S. Zozaya and Flagstaff Broadcasting Foundation. *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990).[1] The Commission agreed with the Review Board that Zozaya was not entitled to integration credit because her proposal for full-time and part-time management of two proposed facilities located 135 miles apart was unreliable. Zozaya proposes to devote 70 hours a week to management of the two stations. Tr. 183. Zozaya will reside in Flagstaff and proposes to spend at least 40 hours a week managing the Flagstaff station, which would constitute full-time integration. Tr. 45, 51-52. She proposes to be integrated part-time in Paradise Valley, devoting 30 hours a week to management of that station, for which her application is presently pending. Tr. 189. Further, Zozaya proposes to devote time to civic activities. Tr. 152, 177, 179. She intends to spend one day a week at the Paradise Valley station, but otherwise proposes to work 14 hour days, managing both stations from Flagstaff. Tr. 173-74.

2. At the outset, it is important to emphasize that Zozaya has the burden to establish how she will carry out her proposal. *See Cuban-American Limited*, 5 FCC Rcd 3781, 3785 ¶ 28 (1990), *recon. denied*, 5 FCC Rcd 7321 (1990). Moreover, Zozaya must demonstrate a reasonable likelihood that her proposal will be fully effectuated. *See Margaret Garza*, 1 FCC Rcd 1294 n.1 (Rev. Bd. 1986), *rev. denied*, 3 FCC Rcd 2525 (1988). At the hearing, Zozaya did not offer, as part of her direct case, any details of her 70 hour a week proposal, which included full-time management of the Flagstaff station and part-time management of the Paradise Valley station. However, later in the hearing she generally described her proposed 14 hour day, which includes 9 hours devoted to Flagstaff and 5 hours to Paradise Valley, but did not specify how many days a week she intended to work this schedule, except to state that she would spend one day each week in Paradise Valley. Also, she did not make clear how much time she intended to devote to civic activities, which she proposed to continue. In our earlier order, 5 FCC Rcd at 6607 ¶ 3, we found that, while precedent does not *per se* mandate the rejection of integration proposals for a 70 hour work week, precedent does require the rejection of proposals, which in light of all relevant circumstances, are not likely to be effectuated. We held that Zozaya did not present a definite proposal likely to be effectuated, since it was unclear how many days a week she intended to work; her rigorous 14 hour a day schedule provided no flexibility in case one or both stations required more than the time allotted; and her schedule provided no significant time to devote to civic activities. *See* 5 FCC Rcd 6607 ¶ 3, nn.2, 4. Zozaya now seeks reconsideration of the Commission's action.

3. Zozaya's principal contention is that the Commission erred in finding that she did not adequately demonstrate that her 70 hour a week integration proposal was definite and could be effectuated. Zozaya claims that she made a specific and credible showing of how her full-time commitment to Flagstaff can be met. She further claims that in past cases the Commission has credited 70 hour a week proposals where they have been set forth in adequate detail. Zozaya asserts that the Commission's denial of integration credit is based on speculation that she could not carry out her proposal.

4. We note that Zozaya's petition is procedurally deficient because Zozaya does not rely on new facts or circumstances or on facts unknown to her and not discoverable through ordinary diligence at the last opportunity to present such matters. The Commission's rules require such a showing where an application for review is denied. *See* 47 C.F.R. §§ 106(b)(2)(i), 106(b)(2)(ii). Zozaya merely reiterates her arguments that the existing record and case precedent support acceptance of her proposal. Despite this procedural deficiency, we believe that it would be helpful to elaborate upon certain matters raised in the petition, although we find Zozaya's petition without merit and therefore deny it.

5. Zozaya argues that the Commission erred in concluding that her participation in civic activities would undermine the reliability of her integration proposal, since, according to Zozaya, the time she would spend on civic activities will be coextensive with, and not in addition to, the time she will devote to the day-to-day operation of the Flagstaff station. Zozaya's proposed 70 hour work week is at the outer limits of credibility. *See Northern Sun*, 100 FCC 2d 889, 891-92 ¶ 5 (Rev. Bd. 1985), *rev. denied*, FCC 86-135 (Mar. 28, 1986). Zozaya presently devotes 25 hours a week to civic activities, but she testified that she would curtail these activities to accommodate her integration proposal. Nevertheless, she testified that she considered civic participation "vital in addressing the community's need relative to program and to survey." Tr. 179. Thus, although not entirely consistent, Zozaya's testimony seems to indicate that she intends to continue a significant level of civic activities tending to conflict with the demands of

her 70 hour a week schedule. However, Zozaya testified on cross-examination that her present participation in numerous regional, state, and national civic organizations (Zozaya Ex. 1 at 2) involves attending meetings, retreats and conventions, as well as participating in developing policy for these organizations, which necessitates the preparation of research and position papers. Tr. 132-55. Even assuming that some civic activities could be conducted on station premises (Tr. 179-181) and that her involvement in these activities would be somewhat curtailed, Zozaya has not met her burden of demonstrating how the activities described in her testimony would be integral to the day-to-day management of the station. Therefore, her simple assertion that she could combine civic activities and station management without augmenting her time commitment does not resolve the evident uncertainties concerning her proposal. *See e.g., Pentacostal Revival Association, Incorporated*, 1 FCC Rcd 842 ¶¶ 2-3 (Rev. Bd. 1986), *erratum*, 1 FCC Rcd 1151 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 6068 (1987).[2]

6. As an additional matter, Zozaya contends that our action is inconsistent with *Royce International Broadcasting*, 4 FCC Rcd 7139 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 7063 (1990), since the applicant in that case received credit for a 70 hour a week integration proposal, such as hers, consisting of full-time integration at one station and part-time integration at another. We reject Zozaya's assertion that because the applicant in *Royce* received credit for a 70 hour work week, Zozaya must be given credit for a 70 hour proposal. In that case, a renewal applicant proposed to work full-time at two stations for which he had applications pending. The ALJ rejected this proposal consistent with Commission policy disallowing credit for two full-time proposals in an 80 hour work week. Nevertheless, the ALJ, on his own motion, reformed the applicant's proposal by reducing the full-time proposal before him to a proposal of 30 hours a week for part-time integration, effectively crediting the applicant with a 70 hour work week. As we have previously noted, there was no Commission review of the award of integration credit to Royce. *See* 5 FCC Rcd at 6609 n.5. Furthermore, the Commission's decision in *Cuban-American Limited*, 5 FCC Rcd 3781, 3786 n.3 (1990), *recon. denied*, 5 FCC Rcd 7321 (1990), issued prior to the Commission's decision in *Royce*, allows for the award of part-time credit upon the rejection of the applicant's full-time proposal only on a specific showing of the number of hours a week a principal will be integrated on a part-time basis. Thus, the *Cuban-American* standard for awarding part-time integration credit is the applicable and controlling precedent. Since ALJ's award of part-time integration credit in *Royce* is inconsistent with *Cuban-American*, it is clear that if a question had been raised, we would have overturned the ALJ's ruling and, thus, we now specifically disavow that aspect of *Royce*.

7. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed December 10, 1990 by Julia S. Zozaya IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) a Petition for Reconsideration filed December 10, 1990 by Julia S. Zozaya; (2) an Opposition to the Petition for Reconsideration filed December 26, 1990 by Flagstaff Broadcasting Partnership; and (3) a Reply to the Opposition filed January 9, 1991 by Zozaya.

[2] Zozaya also challenges the Commission's determination that her proposal is unreliable because the 14 hour work days contemplated do not provide for potential increased demands of the Flagstaff station, which she acknowledged may require more than 40 hours a week to manage. Zozaya further argues that commuting time should be evaluated only with respect to the Paradise Valley proposal, which is not directly under consideration here. These arguments underscore Zozaya's failure to present a specific, credible integration proposal. Since Zozaya plans to manage two radio stations 135 miles apart, her entire proposed work week must be considered, including both potential additional demands and commuting time between Flagstaff and Paradise Valley. *See Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 ¶¶ 37-44 (Rev. Bd. 1986), *recon. denied*, 1 FCC Rcd 1267, *rev. denied*, 2 FCC Rcd 6080 (1987). Zozaya has the burden of proving the likelihood that she can carry out her proposal to manage two stations. Therefore, the failure of her rigorous schedule to permit flexibility to accommodate any potential increased demands of managing the Flagstaff station or to include commuting time undermines the credibility of her proposal, and thus she has fallen short of meeting her burden of proof. *See generally, Stanly Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5020-21 ¶ 18 (Rev. Bd. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Tel Telecommunications Corp., Transferee — File No. I-T-C-91-137-TC

and

Taconic Long Distance Service Corp., Transferor,

Application for Transfer of Control of International Resale Authorization of Taconic Long Distance Service Corp., pursuant to Section 214 of the Communications Act of 1934, as amended

MEMORANDUM, OPINION, AND ORDER

Adopted: July 12, 1991; Released: July 19, 1991

By the Chief, International Facilities Division:

1. On May 24, 1991, Rochester Tel Telecommunications Corp. (RTTC) and Taconic Long Distance Service Corp. (Taconic) filed the above-captioned application pursuant to Section 214 of the Communications Act, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, requesting authority to transfer control of Taconic to RTTC.[1] The application was put on public notice on June 5, 1991, and no comments were received.

2. The parties state that Taconic is a New York corporation that provides resold international message telecommunications services (IMTS) to international locations by reselling the switched voice services of RCI Corporation and US Sprint.[2] Taconic operates under the streamlined regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*. [3] On May 20, 1991, Taconic filed its international switched voice services tariff with the Commission.

3. RTTC is a Delaware corporation, ultimately wholly owned by Rochester Telephone Corporation (RTC), a New York Corporation. RTTC is a holding company whose subsidiaries currently provide a variety of long distance services, both domestic and international.[4] RTTC's subsidiary long distance service providers are non-dominant international carriers subject to the streamlined requirements established in *International Competitive Carrier Policies*.

4. The application states that RTTC, through its parent Rochester Tel Telecommunications Holding Corporation, will acquire all of Taconic's issued and outstanding shares while Taconic Telephone Corp. will acquire shares of RTC's voting stock. Taconic will become a direct subsidiary of RTTC. Taconic will continue to provide its international resale services.

5. The applicants state that the proposed transaction will result in improved and more efficient service to both existing and future customers. They state that it will permit a consolidation of resources which will result in economies of scale. They allege that RTTC's competitive position will be enhanced by expanding its service offerings in the face of growing competition, furthering its overall plan to seek out new markets and expand the interexchange customer base.

6. In view of the foregoing, we conclude that the transfer of control of Taconic to RTTC will serve the public interest. It will permit the consolidation of resources and expansion of services. We note that after the proposed transfer of control, Taconic will continue to be subject to streamlined regulatory requirements for non-dominant international telecommunications carriers.

7. Accordingly, IT IS ORDERED that the application of Rochester Tel Telecommunications Corp. and Taconic Long Distance Service Corp., File No. I-T-C-91-137-TC, IS GRANTED and we consent to the transfer of control of Taconic, which holds the Section 214 authorization originally granted in File No. I-T-C-91-027 (*see* n.2), to RTTC.

8. IT IS FURTHER ORDERED that Taconic must continue to maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

9. IT IS FURTHER ORDERED that Taconic must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1990).

10. IT IS FURTHER ORDERED that Taconic is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in RCI Corporation Tariff F.C.C. No. 1 and US Sprint Tariff F.C.C. No. 1 between the U.S. and those points listed in the aforementioned tariffs in accordance with the above-captioned applicant's previous authorization (*see* n.2).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application was actually filed by RTTC. Taconic Telephone Corp., the parent of Taconic, filed a supplement on July 10, 1991, in support of the instant application.

[2] *See* Taconic Long Distance Service Corp., File No. I-T-C-91-027, and RCI Long Distance New England, Inc., File No. I-T-C-91-028, 6 FCC Rcd 1744 (1991).

[3] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[4] *See, e.g.*, n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of
Valerie Woodson and Henry Cornell
for Tax Certificates

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; Released: July 19, 1991

By the Commission:

1. We consider here the petition of Valerie Woodson and Henry Cornell, shareholders of Radio Radio, Inc. ("RRI"), in which they seek tax certificates pursuant to Section 1071 of the Internal Revenue Code, 26 U.S.C. Section 1071. Their request is based on RRI's dismissing, for monetary consideration, its application for a construction permit to operate on the frequency occupied by KRTH-FM, Los Angeles, California, thereby facilitating the assignment of a station operated by RKO General, Inc., ("RKO") to new ownership.

2. *Background*. The instant tax certificate is requested in connection with RRI's participation in the RKO settlement proceedings. The settlements arose from proceedings that "defied resolution for 23 years . . . taxing the resources of the Commission and the parties and, more importantly, depriving the communities involved of an unquestionably qualified licensee able to devote its full resources to broadcasting."[1] Upon conclusion of a joint mediation effort, Administrative Law Judge Sippel issued his partial initial decision in *RKO General, Inc. (KRTH)*, 3 FCC Rcd 2270 (I.D. 1988), which conditionally granted applications filed by Future Broadcasting, Inc. ("Future"), which were mutually exclusive with RKO's renewal applications for KRTH(AM/FM), Los Angeles, California. Subsequent to that decision, a settlement agreement was reached among the parties to the Los Angeles proceeding. That agreement proposed the assignment of KRTH(AM/FM) from RKO to Future, and then to "white knights" composed of wholly-owned subsidiaries of Beasley AM and FM Acquisition Corporations ("Beasley") and the dismissal of RRI's application. Upon finding that the settlement agreement conformed to criteria set forth in *RKO General (KHJ-TV)*, [2] and was consistent with the public interest, it was approved by the Commission. [3] Thereafter, Woodson and Cornell, principals of RRI, requested that tax certificates be issued under Section 1071 of the Internal Revenue Code (26 U.S.C. Section 1071) on the basis that the underlying dismissal of RRI's application was necessary and appropriate to effectuate changes in policy adopted by the Commission to settle all of the RKO proceedings. Section 1071 provides that the Commission can issue tax certificates where the sale or exchange of property is considered necessary or appropriate to effectuate changed Commission policy.

3. RRI contends that its principals are entitled to tax certificates for the dismissal of its competing construction permit application because that action was necessary and appropriate to effectuate a new or changed Commission policy relating to the ownership of broadcast stations. RRI asserts that its "agreement to dismiss its application voluntarily was akin to the sale of property" within the meaning of 26 U.S.C. Section 1071, and warrants issuance of a tax certificate. In *RKO*, as set forth by RRI, the Commission:

> utiliz[ed] the "white knight" structure . . . [whereby] the total price paid by the "white knight" for the license and the assets would be split between RKO and all competing applicants. In such settlements, RKO would receive substantially less than fair market value for its stations' assets.

Petition, p.4. RRI observes that the Commission has recognized situations involving the sale or exchange of nonwireline cellular partnership interests which did not involve the divestiture of a radio broadcast station yet were found appropriate for tax certificate treatment.[4] It asserts that, as in *Telocator*, the Commission's policy encouraging settlement "anticipated and in substantial measure compelled" the agreements whereby RRI dismissed its application. Consequently, RRI argues that the RKO settlement proceeding represents a "logical extension" of Commission policy concerning tax certificates, and is consistent with the purpose of 26 U.S.C. Section 1071.

4. *Discussion*. Section 1071 of the Internal Revenue Code provides in pertinent part:

> If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033.

26. U.S.C. Section 1071(a). The practical effect of the issuance of a tax certificate is to entitle the recipient to defer payment of a capital gains tax on the sale.

5. We are unable to find in the action taken in connection with the settlement agreement "a change in policy" or "the adoption of a new policy" of the type contemplated by Section 1071 of the Internal Revenue Code. While policy may be changed in the course of an adjudicatory proceeding, RRI's case does not reflect any such change justifying the issuance of a tax certificate. A policy is generally applicable to a broad category of parties similarly situated and is designed to implement far-ranging public interest goals. Although RRI asserts that a new settlement policy was born out of the instant proceeding, nothing in the text of the Commission's orders suggests that a rule or policy of general applicability was established or that the incentive of a tax certificate was either necessary or appropriate to encourage settlements. To the contrary, it is more accurate to say that through the RKO settlements the Commission sought to achieve a specific remedy based on particular facts in order to terminate a complex adjudication.

6. The *Telocator* decision, unlike here, did not involve a specific adjudicatory case with limited applicability. Rather, it related to furtherance of generic pro-settlement li-

censing policies adopted in a Rule Making proceeding. *See* 58 RR 2d at 1446.[5] Moreover, in *Telocator*, exchanges of nonwireline cellular partnership interests had been previously eligible for tax relief under 26 U.S.C. Section 1031. On July 18, 1984, that section was amended to deny such treatment to exchanges of cellular partnership interests. Since the nonwireline settlements were then substantially complete, the Commission found the prospect of exposing the applicants to tax liabilities not contemplated at the time their applications were filed to be inequitable. Consequently, Section 1071 was extended to them to remedy the unforeseeable deletion of beneficial tax treatment under Section 1031, which had induced the filing of the very applications in question. In contrast, the instant case presents no such exigency warranting extension of Section 1071 on equitable grounds to RRI.

7. The fashioning of a remedy in a particular case may often call for a reasoned departure from established policies so as to achieve discrete public interest goals. In so doing, the Commission is not establishing a new policy of general applicability and such instances will not ordinarily be of such consequence as to justify the issuance of a tax certificate as an incentive to encourage or assure adherence to that fashioned remedy.

8. *Conclusion*. Upon careful consideration of the foregoing, the request of Valerie Woodson and Henry Cornell for issuance of tax certificates IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 657 (D.C. Cir. 1984).

[2] *RKO General (KHJ-TV), 3 FCC Rcd 5057 (1988), appeal dismissed sub nom. Los Angeles Television, a California Limited Partnership FCC*, No. 88-1673 (D.C. Cir. August 4, 1989).

[3] *RKO General, Inc. (KRTH)*, 4 FCC Rcd 4089 (1989).

[4] *See Telocator Network of America*, 58 RR 2d 1443 (1985).

[5] Notably, the petition was filed by a trade association on behalf of 57 separate petitioners.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of
S/G Communications for a
Tax Certificate

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; Released: July 19, 1991

By the Commission:

1. We consider here the petition of S/G Communications ("SGC"), in which it seeks a tax certificate pursuant to Section 1071 of the Internal Revenue Code, 26 U.S.C. Section 1071, for its sale of WOR and WRKS-FM, New York, New York, to Buckley - WOR Broadcasting Corporation ("BWB") and Summit-New York Broadcasting Corporation ("SNY"), respectively.

2. *Background*. The instant tax certificate is requested in connection with SGC's participation in the RKO settlement proceedings. The settlements arose from proceedings that "defied resolution for 23 years . . . taxing the resources of the Commission and the parties and, more importantly, depriving the communities involved of an unquestionably qualified licensee able to devote its full resources to broadcasting."[1] Upon conclusion of a joint mediation effort, Administrative Law Judge Luton issued his partial initial decision in *RKO General, Inc. (WOR)*, 3 FCC Rcd 4243 (I.D. 1988), selecting SGC as the preferred comparative challenger for WRKS-FM, New York, New York, while Women Owning Radio was selected for the WOR(AM) facility. Subsequent to that decision and prior to argument on exceptions filed with the Review Board, settlement agreements were reached among the parties to the New York proceeding. Those agreements proposed the assignment of WRKS-FM and WOR(AM) from RKO to SGC, and then to BWB (WOR-AM) and SNY (WRKS-FM). Upon finding that the settlement agreements conformed to criteria set forth in *RKO General (KHJ-TV)*, [2] and were consistent with the public interest, they were approved by the Commission. [3] Thereafter, SGC requested that a tax certificate be issued to its principals under 26 U.S.C. Section 1071 on the basis that the underlying assignment was necessary and appropriate to effectuate changes in policy adopted by the Commission to settle all of the RKO proceedings. Section 1071 provides that the Commission can issue certificates where the sale or exchange of property is considered necessary or appropriate to effectuate a changed or new Commission policy. A tax certificate allows the recipient to defer capital gains tax if the proceeds of the sale in question are reinvested in similar property within two years.

3. SGC contends that it is entitled to a tax certificate for the assignment of the subject stations to "white knights" because of SGC's efforts "to bring about compliance with a new or changed policy relating to the ownership of broadcast stations." Specifically, SGC contends that the settlement criteria established by the Commission for the RKO proceedings represented a departure from prior settlement and distress sale policies, and from the standards of *Jefferson Radio Company v. FCC*,[4] which generally forbid the transfer of a broadcast station before the basic qualifications of the licensee have been established. In *RKO*, as set forth by SGC, the Commission permitted:

> a qualified applicant to an unusual and complex comparative broadcast proceeding to settle the case and dismiss its application after the hearing has started for cash consideration, provided by a non-party to the comparative proceeding, where the Commission's deterrence policy will not be impaired and the public interest factors in favor of the settlement are substantial, and the licensee will receive less than 75% of the fair market value of the station.

Petition, p. 16, n.3. SGC argues that this new policy, adopted to resolve the protracted and complex RKO proceedings, essentially created a procedure that would allow RKO-type cases to be settled by the introduction of "white knights" dependent upon the voluntary acquiescence of third parties, like SGC, "who were not compelled by operation of law to settle the case, but, by doing so . . . advanced the public interest." While SGC admits that not every "voluntary settlement . . . is grounds for issuance of a tax certificate,"[5] it asserts that "the heroic efforts" on the part of the principals of SGC towards achieving the settlement warrants preferential tax treatment. SGC argues that its assignment of hearing rights to successors for WRKS-FM and WOR may be likened to the sale of stations owned in combinations now prohibited under the multiple ownership rules which, because of "grandfathered" status, qualify for tax certificates when compliance with the rules are achieved upon sale.[6] Furthermore, SGC argues that the Commission has previously recognized the importance of encouraging settlements to expedite service to the public in issuing tax certificates to applicants for nonwireline cellular radio licenses. Finally, SGC notes that, prior to settlement, it had put forward the application with the intent of acquiring and operating the subject stations, and had it followed this course to completion, it would have "obtain[ed] broadcast assets without incurring any tax liability thereby." The issuance of a tax certificate on these facts, it argues, would merely restore SGC to the same "tax position it would have been in but for the settlement."

4. *Discussion*. Section 1071 of the Internal Revenue Code provides in pertinent part:

> If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033.

26 U.S.C. Section 1071 (a). The practical effect of the issuance of a tax certificate is to entitle the recipient to defer payment of a capital gains tax on the sale.

5. We are unable to find in the action taken in connection with the settlement agreement "a change in policy" or "the adoption of a new policy" of the type contemplated by Section 1071 of the Internal Revenue Code. While policy may be changed in the course of an adjudicatory proceeding, SGC's case does not reflect any such change justifying the issuance of a tax certificate. A policy is generally applicable to a broad category of parties similarly situated and is designed to implement far-ranging public interest goals. We do not agree with SGC's assertion that a new policy was born out of the instant proceeding or that the incentive of a tax certificate was either necessary or appropriate to encourage settlements. Nothing in the text of the Commission's orders suggests that a rule or policy of general applicability was established. To the contrary, it is more accurate to say that through the RKO settlements the Commission sought to achieve a specific remedy based on particular facts in order to terminate a complex adjudication.

6. The fashioning of a remedy in a particular case, as here, may often call for a reasoned departure from established policies so as to achieve discrete public interest goals. In so doing, the Commission is not establishing a new policy of general applicability and such instances will not ordinarily be of such consequence as to justify the issuance of a tax certificate as an incentive to encourage or assure adherence to the fashioned remedy.

7. Furthermore, we also note that under our distress sale policy, tax certificates are not available to licensees placed in hearing on qualifications issues who elect to sell their stations at distress sale prices rather than risk an adverse ruling and resulting loss of license.[7] We are aware of our discretion to so limit tax certificates to exclude such applicants. The fact that no adverse findings have been made respecting SGC's qualifications, however, does not provide independent justification for issuance of a tax certificate in this case.[8] As to SGC's argument that its profit presents an inequitable taxable capital gain, the profit taken by SGC for stations never constructed, improved or operated was essentially realized without risk of loss, and affords no independent basis for issuance of a tax certificate.

8. *Conclusion*. Upon careful consideration of the foregoing, the request of S/G Communications for a tax certificate IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 657 (D.C. Cir. 1984).

[2] *RKO General (KHJ-TV)*, 3 FCC Rcd 5057 (1988), *appeal dismissed sub nom. Los Angeles Television, a California Limited Partnership v. FCC*, No. 88-1673 (D.C. Cir. August 4, 1989).

[3] *See RKO General, Inc. (WOR)*, 4 FCC Rcd 4072 (1989); *RKO General, Inc. (WOR)*, 4 FCC Rcd 5747 (1989).

[4] *Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

[5] SGC suggests that the Commission limit issuance of such tax certificates to those settling applicants against whom unresolved basic qualifications issues did not exist.

[6] *See Policy Concerning Issuance of Tax Certificates*, 59 FCC 2d 91 (1976).

[7] *Blue Ribbon Broadcasting, Inc.*, 47 RR 2d 359, n.3 (1978).

[8] SGC's reliance on *Telocator Network of America*, 58 RR 2d 1443, 1446 (1985), is misplaced. That case did not involve a specific adjudicatory case with limited applicability. Rather, in response to a petition filed by a trade association representing 57 petitioners, the Commission granted tax certificates to further generic pro-settlement licensing policies adopted in a Rule Making proceeding. Moreover, in that case, exchanges of nonwireline cellular partnership interests had been previously eligible for tax relief under 26 U.S.C. Section 1031. On July 18, 1984, that section was amended to deny such treatment to exchanges of cellular partnership interests. Since nonwireline settlements under consideration by the Commission were then substantially complete, the Commission found inequitable the prospect of exposing the applicants to tax liabilities not contemplated at the time their applications were filed, after having "consistently urg[ed] the applicants to enter into time-consuming negotiations." Consequently, Section 1071 was extended to them to remedy the unforeseeable deletion of beneficial tax treatment under Section 1031, which had induced the filing of the very applications in question. In contrast, the instant case presents no such exigency warranting extension of Section 1071 on equitable grounds for SGC.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC. Bay Shore, New York *et al.* File No. BPH-850712GV

For a Construction Permit for a new FM Station on Channel 276 at Bay Shore, New York

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1991; Released: July 19, 1991

By the Commission:

1. Long Island Music Broadcasting Corporation's (LIMBC) application was dismissed for failure to prosecute. *Warren Price Communications, Inc.*, 4 FCC Rcd 1992 (1989), *reconsideration denied* 5 FCC Rcd 2906 (1990), *appeal dismissed with prejudice, sub nom. Long Island Music Broadcasting Corporation v. FCC*, Case No. 90-1302 (D.C. Cir. Mar. 26, 1991). While LIMBC's appeal was pending, this proceeding was settled by an agreement among the remaining applicants with the merger of three of the applicants into a new entity, Shore Media, Inc., and the grant of Shore Media's application. *Warren Price Communications, Inc.*, 90M-3570 (ALJ Nov. 8, 1990). A petition filed by Bay Shore Broadcasting Corp., seeking to overturn the settlement, was dismissed by the Review Board. *Warren Price Communications, Inc.* 6 FCC Rcd 575 (Rev. Bd. 1991). In addition, in a Memorandum Opinion and Order, *Warren Price Communications, Inc.*, 6 FCC Rcd 992 (1991), the Commission denied the relief requested by LIMBC in a Supplement to Petition for Reconsideration and Petition to Dismiss applications filed by the other applicants in this proceeding.[1] Now before the Commission are a Petition for Review of the Board's refusal to overturn the settlement agreement, filed March 7, 1991 by LIMBC;[2] and a Petition for Reconsideration of the Commission's denial of LIMBC's Petition to Dismiss, filed March 25, 1991 by LIMBC. [3] For the reasons that follow, we reject both petitions.

2. *The Settlement Agreement*: LIMBC's Petition for Review is untimely and will be dismissed. Under 47 C.F.R. § 1.115 (d), an application for review of actions taken under delegated authority "shall be filed within 30 days from the date of public notice of such action. . . ." In this case the Board's ruling refusing to set aside the settlement agreement was released on Friday, February 1, 1991. Public notice of the Board's action was given on the next business day, Monday, February 4, 1991, and the 30 day period for filing applications for review began the day after that, February 5, 1991. 47 C.F.R. § 1.4(a), (b). Consequently, the filing deadline for an application for review was March 6, 1991. LIMBC's Petition for Review was filed one day late on March 7, 1991. Moreover, LIMBC has failed to show why it could not file in a timely manner or otherwise request or present a basis for a waiver of the time constraints of Section 1.115.

3. In any case, LIMBC also lacks standing to file an application for review of the Board's ruling. LIMBC has not shown that it was prejudiced by the Board's action, and its mere status as a former applicant does not confer upon it status to request review of a ruling concerning the private interests of the parties to the settlement agreement.[4] *Denton FM Radio, Ltd.*, 56 RR 2d 171, 172 (Rev. Bd. 1984), *review denied*, FCC 85-452 released August 13, 1985; *Kenneth J. Crosthwait*, 79 FCC 191, 194 (1980). *See also Arizona Mobile Telephone Co.*, 80 FCC 2d 87, 89-90 (Rev. Bd. 1980) (non-party not allowed to intervene to further its private interest).

4. *The Petition for Reconsideration*: In *Warren Price Communications, Inc.*, 6 FCC Rcd 992, *supra*, we found that LIMBC had failed to raise substantial questions concerning Shore Media's proposed antenna site. LIMBC now argues that we erred in rejecting affidavits submitted in support of its pleading. It asserts that those affidavits raised questions concerning site availability that warranted reopening the record and further hearings. LIMBC also argues that it has new information which raises further questions about Shore Media's qualifications to be a licensee. Specifically it alleges that Shore Media will be unable to get zoning clearance to modify the tower to accommodate its proposed antenna; that the proposed modification to the tower will be a hazard to air navigation; and that Shore Media's failure to adhere to the terms of the settlement agreement raises questions with respect to its financial qualifications. We see no basis in the arguments presented to upset our earlier rulings.

5. Shore Media proposes to mount its antenna on a tower owned by station WLIX, Islip, New York. In seeking to reopen the record, LIMBC submitted affidavits from two individuals affirming that they had talked to Lloyd Parker, the General Manager of WLIX, who allegedly told them that no one had been granted permission to mount an antenna on WLIX's tower. LIMBC asserts that we erred in treating these affidavits as hearsay. The affidavits, however, merely contained the affiant's reports of unsworn statements by Parker. LIMBC could have produced a sworn statement from Parker, who is not a party to this proceeding. Susan Lunborg, a former applicant who is now a principal of Shore Media, submitted a statement from Parker affirming under penalty of perjury that Shore Media had reasonable assurance of access to WLIX's tower. Under these circumstances, the statements in LIMBC's affidavits are hearsay and insufficient to support enlargement of the issues. *Kaye-Smith Enterprises*, 98 FCC 2d 675, 686 (Rev. Bd. 1984); *Jimmie H. Howell*, 46 FCC 2d 50, 57-58 (Rev. Bd. 1974). Thus, LIMBC has not shown that the Commission erred in finding that LIMBC's affidavits failed to raise a substantial and material question of fact sufficient to require further hearings in this proceeding.

6. LIMBC also argues, however, that it has new information which warrants reopening the record. It submitted a letter from the Supervisor of the Town of Islip, which LIMBC alleges shows that Shore Media has not

"sought local zoning clearance." The letter, however, shows only that the Supervisor has concerns about a proposal to modify the WLIX tower. For the reasons set forth below, it does not raise a substantial and material question of fact concerning whether WLIX has reasonable assurance for its proposed use of the WLIX tower.

7. It is well established that an applicant need not demonstrate advance government approval, or even the likelihood thereof, in order to have a reasonable assurance of site availability. *Gencom Inc. v. FCC*, 832 F.2d 171, 182 n.13 (D.C. Cir. 1987). In keeping with that principle, the Commission generally leaves zoning questions to local authorities and we will not add site availability issues based upon a mere difference of opinion about whether local officials will approve a zoning change. *Sunshine Broadcasting, Inc.*, 1 FCC Rcd 174 ¶ 6 (1986). Absent evidence to the contrary, there is an assumption that local authorities will act favorably on zoning requests. *El Camino Broadcasting Corp.*, 14 FCC 2d 361, 363 (Rev. Bd. 1968). Thus, the Commission has found that site availability issues were not warranted absent a showing that it was likely that the requested zoning would be denied. *San Francisco Wireless Talking Machine Co., Inc.*, 47 RR 2d 889, 893 (1980). For example, in *Gainesville Media, Inc.*, 59 FCC 2d 382, 384-85 (Rev. Bd. 1976), proposed construction on land zoned for agriculture, and for which the county land use plan contemplated single family homes, did not raise a question of site availability absent a showing that the county would deny a special use permit required for the site.

8. The Commission has specified site availability issues where there was sufficient evidence to demonstrate that permission to use a site will be denied. *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 519-20 ¶ 11 (1986) (use of site was previously denied by local board); and *El Camino Broadcasting Corp., supra* (zoning previously denied for tower on the "same general plot."). In *Salinas Broadcasting, Ltd.*, 4 FCC Rcd 8325, 8327 ¶¶ 9-11 (Rev. Bd. 1989), 5 FCC Rcd 1613 (Rev. Bd. 1990), the Board added an issue based on a showing that the County Planning Commission and Airport Land Use Commission firmly oppose use of the designated site and that the Chairman of the Board of Supervisors, which appoints the Planning Commission and reviews its decisions, views approval of the actual proposed site as unlikely.

9. Under the foregoing precedents, LIMBC has not raised a substantial and material question of fact warranting specification of an issue for hearing. The letter from the Supervisor of the Town of Islip indicates that it was written without actually reviewing Shore Media's plan to modify the WLIX tower. It states that the town previously rejected a proposal by the National Weather Service to build a tower. There is, however, no attempt to explain why the town's previous rejection of the National Weather Service's proposal for a new tower would raise the same issues as the modification of this existing tower. While the letter indicates the town's "possible concerns," it does not specifically state that the Supervisor is opposed to Shore Media's proposal, or that it will likely be rejected by the town board, as required by precedent. The letter only establishes that the proposal will be reviewed for its environmental impact. Thus, LIMBC has not made a sufficient showing of a likelihood that zoning will be denied to warrant reopening the record for consideration of site availability issues.

10. Nor do the other new matters raised by LIMBC raise substantial and material questions of fact. There is no basis for questioning whether Shore Media's antenna would pose an air hazard. The FAA's aeronautical study, which was made a part of the record in this proceeding, cleared its proposed use of the WLIX tower. LIMBC has made no showing that would provide a basis for questioning the validity of the FAA's previously documented concurrence in Shore Media's proposal. Finally, the argument concerning Shore Media's alleged failure to adhere to the terms of the settlement agreement is based on speculation. LIMBC has not alleged any specific facts that would call into question Shore Media's financial qualifications.

11. ACCORDINGLY, IT IS ORDERED, That the Petition for Review filed March 7, 1991 by Long Island Music Broadcasting Corporation, the Motion to Revoke Grant of Construction Permit filed May 6, 1991 by Fire Island Lighthouse Radio Association, Inc., and the Opposition to Motion to Revoke Grant of Construction Permit filed May 16, 1991 by Shore Media, Inc. ARE DISMISSED, and that the Petition for Reconsideration filed March 25, 1991 by Long Island Music Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In *Warren Price Communications, Inc.*, 5 FCC Rcd 2906 (1990), the Commission denied an earlier request by LIMBC to dismiss the applications filed by the other applicants in this proceeding. LIMBC's appeal of that ruling was dismissed by the Court of Appeals without prejudice. *Long Island Music Broadcasting Corporation*, Case No. 90-1518 (D.C. Cir. Mar. 26, 1991).

[2] Shore Media filed an Opposition on March 14, 1991.

[3] Shore Media filed an Opposition on April 4, 1991. On May 6, 1991 Fire Island Lighthouse Radio Association, Inc. (FILRA) filed a Motion to Revoke Grant of Construction Permit, and on May 16, 1991 Shore Media filed an Opposition to FILRA's Motion. FILRA has not alleged any specific facts in support of its motion. Moreover, FILRA is not a party to this proceeding and it has not made any attempt to show good cause for its failure to seek to participate in this proceeding in a timely manner. Thus, FILRA's motion will be dismissed without any further consideration and the Opposition filed by Shore Media will be dismissed as moot. *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. Apr. 23, 1991).

[4] In any event, LIMBC has not presented any arguments demonstrating that the Board erred in its ruling.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and
Telegraph Company

Petition for Declaratory Ruling

ORDER

Adopted: July 12, 1991; Released: July 19, 1991

By the Chief, Common Carrier Bureau:

1. On March 13, 1990, American Telephone and Telegraph Company (AT&T) filed a petition for declaratory ruling[1] that the equal access balloting procedures announced by the Puerto Rico Telephone Company (PRTC) violated the Commission's balloting and allocation Orders.[2] PRTC had initially proposed two types of ballots: a "Priority One" ballot available only to customers who requested the ballot in person at one of PRTC's business offices, and a "Priority Two" ballot to be sent by mail to end users. [3]

2. Under PRTC's original procedures, a customer selecting an interexchange carrier (IC) on a Priority Two ballot who later wished to change that selection could notify PRTC either by completing a new Priority Two ballot or by completing a Priority One ballot. However, PRTC's original procedures required any customer making a Primary Interexchange Carrier (PIC) selection on a Priority One ballot to appear in person at one of PRTC's business offices to change the selection. AT&T alleged that this requirement created an unnecessary impediment to changing PICs in violation of the rules set forth in the Commission's balloting and allocation Orders. AT&T Petition at 9-11.

3. In its opposition to AT&T's petition, PRTC states that the Priority One ballot will be available to customers who request it by phone or through the mail, in addition to customers who request the ballot in person at the PRTC business office. PRTC Opposition at 2-4, 6. AT&T indicates in its reply that it "believes that the changes PRTC made after AT&T filed its petition have rendered the petition moot, and that the declaratory ruling sought by AT&T is thus no longer necessary." AT&T Reply at 4. In addition, PRTC reports that it has now completed its conversion to equal access.[4] The Bureau agrees that the issues raised in AT&T's petition are moot, and therefore dismisses the petition.

4. Accordingly, IT IS ORDERED that the petition for declaratory ruling filed by American Telephone and Telegraph Company on March 13, 1990, regarding equal access balloting procedures used by the Puerto Rico Telephone Company, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Puerto Rico Tele-Com Corporation filed a letter supporting AT&T's petition on March 28, 1990.

[2] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985)(*Allocation Order*); *recon. denied*, 102 FCC 2d 503 (*Reconsideration Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 935 (1985)(*Waiver Order*).

[3] PRTC subsequently changed the names of its ballots from "Priority One" and "Priority Two" to "Personal Request" ballots and "Mail" ballots. PRTC Opposition at 3 n.2.

[4] *See* Letter to Chief, Common Carrier Bureau, from P.J. Berman, counsel for PRTC, Jan. 11, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 91-48

In the Matter of

Amendment of Section 73.202(b), RM-7621
Table of Allotments,
FM Broadcast Stations.
(Milford, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 5, 1991; Released: July 22, 1991

By the Chief, Allocations Branch:

1. At the request of 202 Data Systems ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1432 (1991), proposing the allotment of Channel 271C2 to Milford, Iowa, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 271C2 to Milford, Iowa, because it could provide the community with its first local FM service. Channel 271C2 can be allotted to Milford in compliance with the Commission's minimum distance separation requirements with a site restriction of 3 kilometers (1.9 miles) northwest of the community to avoid a short-spacing to Station KAYL-FM, Channel 268C1, Storm Lake, Iowa. [1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Milford, Iowa	271C2

4. The window period for filing applications will open on **September 6, 1991,** and close on **October 7, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 271C2 at Milford are North Latitude 43-20-33 and West Longitude 95-07-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-24

In the Matter of

Amendment of Section 73.202(b), RM-7598
Table of Allotments,
FM Broadcast Stations.
(Canton, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 5, 1991; Released: July 22, 1991

By the Chief, Allocations Branch:

1. At the request of Dallas M. Tarkenton ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 938 (1991), proposing the substitution of Channel 274C2 for Channel 274A at Canton, South Dakota, and the modification of his construction permit for Station KIXK to specify operation on the higher powered channel. [1] Petitioner filed comments restating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 274C2 for Channel 274A at Canton, South Dakota, because it could provide the community with a wide coverage area FM service. Channel 274C2 can be allotted to Canton in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.5 kilometers (12.7 miles) north to accommodate petitioner's desired transmitter site. [2] As proposed, we will also modify petitioner's construction permit for Station KIXK to specify operation on Channel 274C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Canton, South Dakota	274C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Dallas M. Tarkenton for Station KIXK, Canton, South Dakota, IS MODIFIED to specify operation on Channel 274C2, in lieu of Channel 274A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] By *Report and Order*, the Commission modified Station KIXK's construction permit to specify operation on Channel 274A in lieu of Channel 273A at Canton. *See* 6 FCC Rcd 533 (1991).

[2] The coordinates for Channel 274C2 at Canton are North Latitude 43-29-00 and West Longitude 96-38-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-3

In the Matter of

Amendment of Section 73.202(b), RM-7589
Table of Allotments,
FM Broadcast Stations.
(Reedsport, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1991; Released: July 22, 1991

By the Chief, Allocations Branch:

1. At the request of Paul C. Bjornstad ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 368 (1991), proposing the allotment of Channel 258A to Reedsport, Oregon, as the community's second local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 258A to Reedsport, Oregon, because it could provide the community with its second local FM service. Channel 258A can be allotted to Reedsport in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Reedsport, Oregon	221A, 258A

4. The window period for filing applications will open on **September 6, 1991,** and close on **October 7, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 258A at Reedsport are North Latitude 43-42-00 and West Longitude 124-06-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-4

In the Matter of

Amendment of Section 73.202(b), RM-7588
Table of Allotments,
FM Broadcast Stations.
(Eagle Grove, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1991; Released: July 22, 1991

By the Chief, Allocations Branch:

1. At the request of Iowa Inspirational Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 370 (1991), proposing the allotment of Channel 264C3 to Eagle Grove, Iowa, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 264C3 to Eagle Grove, Iowa, since it could provide the community with its first local FM service. Channel 264C3 can be allotted to Eagle Grove in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Eagle Grove, Iowa	264C3

4. The window period for filing applications will open on **September 6, 1991,** and close on **October 7, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 264C3 at Eagle Grove are North Latitude 42-39-54 and West Longitude 93-54-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BLACK TELEVISION WORKSHOP
OF LOS ANGELES, INC.
(Assignor)

and

HISPANIC CHRISTIAN
COMMUNICATIONS NETWORK
(Assignee)

For Assignment of Construction Permit for
Noncommercial Educational Station KEEF-TV,
(Channel 68) Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 1991; Released: July 22, 1991

By the Commission:

1. In this order, we address two petitions, filed on February 22, 1991, by Black Television Workshop of Los Angeles, Inc. ("BTW"), and Mary V. Woodfork ("Woodfork"), seeking reconsideration of *Memorandum Opinion and Order*, 6 FCC Rcd 381 (1991). We also have before us for consideration two oppositions to Woodfork's petition filed on March 7, 1991, by BTW and Hispanic Christian Communications Network ("HCCN"). For the reasons discussed below, we deny both petitions for reconsideration.

2. In our *MO&O*, we directed the Mass Media Bureau to consider the captioned application which contemplates the assignment of construction permit for Noncommercial Educational Station KEEF-TV, Los Angeles, California, from BTW to HCCN, pursuant to the Commission's *Minority Distress Sale Policy*.[1] In so doing, we rejected Woodfork's argument that a sale of KEEF-TV is precluded until such time that the Commission determines through an evidentiary hearing who has the lawful authority to act on behalf of BTW.[2] We also noted two impediments to an immediate grant of the application, one of which involved the proposed selling price.[3] Although BTW proposes to sell KEEF-TV to HCCN for 75% of the station's fair market value, the *MO&O*, at ¶¶ 11-12, determined that the selling price may not exceed an amount in excess of BTW's reasonable and prudent expenses because KEEF-TV is an "unbuilt" station under Section 73.3597(c)(1)(i) of our rules.

3. BTW seeks reconsideration of the determination that KEEF-TV is an "unbuilt" station. BTW concedes that KEEF-TV commenced operations under program test authority with facilities that were at variance with those specified in its construction permit. However, BTW characterizes the technical variances as "minor," and it argues that such changes "would be permissible under Section 73.1615 without prior Commission approval." BTW also claims that no forfeiture was assessed against the station following an inspection by the Field Operations Bureau, thus confirming that BTW's operation of KEEF-TV was lawful. In further support of its position that KEEF-TV should be considered a "built" station, BTW relies on *Syracuse Channel 62, Inc.*, 60 RR 2d 1161, 1166 (1986), and *Pan Pacific Television, Inc.*, 3 FCC Rcd 6629, 6631-6632 (1988), two cases in which the Commission applied a liberal interpretation of Section 73.3597. Additionally, BTW argues that there are compelling equitable reasons for concluding that KEEF-TV is a "built" station. According to BTW, limiting the selling price of the station will result in an unjust enrichment to HCCN of a very valuable facility for a small fraction of its value. As a result, BTW claims that there will be a loss of a television facility to the Black community with "nothing" in return. Finally, BTW argues that it has assumed the same risks and endured the same burdens as any other permittee in placing KEEF-TV in operation.

4. Woodfork opposes the sale of KEEF-TV at any price. She argues that until the issue of control of BTW is resolved through a hearing, it is inappropriate for the Commission to allow the station to be sold. She asserts that the individuals who are proposing to sell the Channel 68 facility have failed to demonstrate that they have the legal authority to act on behalf of the permittee. Woodfork also claims that the Commission has failed to adequately explain the basis for its decision directing the Bureau to consider the sale of KEEF-TV, given the question of control of BTW.

5. We will deny reconsideration to BTW. Station KEEF-TV was ordered off the air because the station commenced operations with facilities that were at variance with its authorization. This extraordinary action was taken because the variances were significant. BTW's construction permit contemplated that KEEF-TV's transmitting antenna would be mounted on a specific existing tower atop Mt. Wilson, at a particular overall height above ground level. The construction permit also authorized the use of a particular make and model of transmitter with a specific effective radiated power. When KEEF-TV went on the air on June 1, 1987, it did so from a different existing tower, at a different overall height above ground level, with a different make and model of transmitter, and with a different effective radiated power. Thus, BTW virtually ignored its construction permit.

6. It also is irrelevant whether or not our Field Operations Bureau assessed a forfeiture against BTW. The fact that the Commission ordered KEEF-TV to cease broadcasting alone confirms that the station was operating improperly and at significant variance with its construction permit. Moreover, BTW's reliance on Section 73.1615 of our rules is without merit. This section pertains to licensees of existing broadcast stations who are in the process of modifying their existing facilities. Section 73.1615 clearly does not apply to a permittee, such as BTW, whose only authorization is for the construction of a new broadcast station.

7. BTW's reliance on the *Syracuse Channel 62* and *Pan Pacific Television* cases, *supra*, also is unavailing. In *Syracuse Channel 62* the Commission stated that it could see little public interest justification for requiring a formalistic reading of Section 73.3597 when the station in question commenced operation pursuant to Special Temporary Authority at a height consistent with a pre-

vious construction permit, but below its current authorization. In *Pan Pacific Television* the Commission found that although the station had commenced operations pursuant to Special Temporary Authority, all the terms of the station's construction permit had been met. Accordingly, the Commission concluded that the station was an "operating station" for the purposes of Section 73.3597. In the instant case, BTW never had any authority to commence operations with facilities different from those specified in its construction permit. Unlike the permittees in the *Syracuse Channel 62* and *Pan Pacific Television*, BTW held no authority -- not even Special Temporary Authority -- to construct and operate as it did. Under the circumstances, there is no public interest justification for rewarding BTW's transgressions by concluding that KEEF-TV is a "built" station within the meaning of Section 73.3597.

8. Nor do we find any equitable justification for reaching a different conclusion. The KEEF-TV construction permit is the subject of a hearing which could result in the revocation of BTW's construction permit with no compensation in return. Grant of BTW's assignment application would further our minority ownership policies by placing the station in the hands of a qualified minority. The fact that the station would be controlled by Hispanics rather than by Blacks does not affect this conclusion. Moreover, BTW's suggestion that the limitation on the sale price will deprive the Black community in Los Angeles of a valuable television outlet is unpersuasive in light of the fact that BTW made the decision to sell KEEF-TV to a non Black entity. Finally, there is no reason to treat BTW like permittees who have properly commenced program tests. Station KEEF-TV should not have gone on the air in the first place. Its operation was not permitted under the Commission's rules, and there is no equitable justification for otherwise condoning BTW's actions in this regard despite the risks and burdens that BTW may have assumed in placing the station on the air.[4]

9. We will also deny Woodfork's request for reconsideration. As we stated in our *MO&O*, Woodfork is the only original member of BTW's board of directors who continues to oppose the distress sale of KEEF-TV. All of the other original members have signed a resolution supporting the transaction. We believe that the resolution constitutes a *bona fide* expression of the permittee's intent, which is to assign the construction permit for KEEF-TV to HCCN and thereby avoid a potentially expensive and protracted revocation hearing. Every person, except Woodfork, who has ever served as a director of BTW, or who could claim to be a director, has either affirmed the proposed distress sale or interposes no objection. BTW's board of directors, however the board may be defined, has voted in favor of the distress sale. Woodfork is simply outvoted. As a result, there clearly is no reason to try the control issue at hearing.

10. In sum, our position regarding the proposed sale of KEEF-TV remains unaltered. Station KEEF-TV is an unbuilt station which may be sold to HCCN at this time, but not for an amount that exceeds BTW's reasonable and prudent expenses. In the event BTW does not amend its pending application to specify an appropriate selling price, the application will be dismissed, and the revocation proceeding will be returned to active status.

11. Accordingly, IT IS ORDERED That the Petition for Partial Reconsideration, filed February 22, 1991, by Black Television Workshop of Los Angeles, Inc. IS DENIED.

12. IT IS FURTHER ORDERED THAT the Petition for Reconsideration, filed February 22, 1991, by Mary V. Woodfork IS DENIED.

13. IT IS FURTHER ORDERED THAT the Comments on Petition for Partial Reconsideration, filed March 12, 1991, by Black Television Workshop of Los Angeles, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978).

[2] As described more fully in the *MO&O*, the KEEF-TV construction permit is the subject of a revocation proceeding in MM Docket No. 88-420. That proceeding arose out of a dispute over control of BTW between Woodfork, an original member of BTW's board of directors, and Booker T. Wade, Jr., the current president of BTW.

[3] The other impediment involved HCCN's failure to adequately indicate that it will operate KEEF-TV on a noncommercial educational basis. HCCN has since provided information to the Bureau in response to this matter.

[4] On March 12, 1991, BTW filed "Comments on Petition for Partial Reconsideration" in which BTW essentially commented on its own request for relief. Such comments are not authorized by the Commission's Rules, and thus this pleading will be dismissed. In any event, BTW's pleading is substantively unavailing. BTW argues in its comments that the Commission's decision in *Bill Welch*, 3 FCC Rcd 6502 (1988), supports permitting BTW to earn a profit on the sale of the KEEF-TV construction permit. BTW is incorrect. In *Bill Welch*, the Commission approved for-profit sales of construction authorizations for unbuilt facilities in the cellular service. However, the Commission explicitly emphasized in *Bill Welch* that its decision "does not in any way affect continued enforcement" of the ban on for-profit sales of broadcast stations contained in Section 73.3597. *See* 3 FCC Rcd at 6505, n. 26. Accordingly, there clearly is no merit to BTW's argument.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Amateur	RM-7401
Service Rules to Revise	RM-7402
Transmitter Power Standards and	RM-7403
Authorized Emissions	RM-7404

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 1991; Released: July 24, 1991

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. This Order denies two petitions requesting that we reconsider an *Order* adopted on October 24, 1990.[1] That *Order* denied requests that we authorize stations transmitting emission type A3E (amplitude modulated double sideband analog telephony, commonly referred to as AM) a maximum output power two to four times greater than the output power allowed stations transmitting any other emission type.[2]

II. BACKGROUND

2. In 1983, the Commission adopted a *Report and Order* in PR Docket No. 82-624 revising the power measurement standard for the amateur service. [3] The Commission stated that these revisions were necessary because the previous rules were archaic and unsuitable to modern operating methods. The previous rules, further, placed unnecessary burdens upon amateur radio operators.[4] Comments submitted in that docket not addressing the effect of the proposal on AM operation supported the proposal. Comments that addressed the effect of the proposal on AM operation claimed that the proposed five year exemption for stations transmitting an AM emission was inadequate and specifically requested that the Commission permanently exempt these stations from the revised power standard. The Commission, while denying requests for a permanent exemption, extended the five year period that stations transmitting an AM emission would be exempt from the revised standard to a period of almost seven years ending June 1, 1990.[5]

3. On October 24, 1990, we adopted an *Order* that, *inter alia*, denied the above-captioned petitions for rule making. Three of these petitions again sought to allow stations transmitting an AM emission a maximum output power level substantially greater than that allowed stations transmitting any other emission type. The fourth petition sought to remove AM as an authorized emission in the amateur service. We stated that the issue of specifying a transmitter power standard for AM that is different than the power standard for the other approximately 1300 emission types is an issue the Commission has previously considered and denied and that the arguments raised by the petitioners were the same as those the Commission considered and rejected in PR Docket No. 82-624.[6] We also dismissed the petition that would have eliminated AM emissions from the amateur service because this request was repetitive.[7]

4. Two of the original petitioners, Dale Gagnon (Gagnon) and The Society for the Promotion of Amplitude Modulation (SPAM), have requested that we reconsider our *Order*. They continue to seek a higher maximum output power for stations transmitting AM. SPAM claims that we did not consider all the technical evidence it presented in its petition for rule making.[8] Gagnon bases his request upon the precedent of a higher output power for a station transmitting AM.[9] SPAM and Gagnon also state that the Commission failed to consider the recent increased interest in AM[10] or the effect of its *Order* on the value of some AM equipment.[11]

III. DISCUSSION

5. The requests of Gagnon and SPAM, although styled as petitions for reconsideration[12] of our *Order*, are actually petitions for reconsideration of our decision in PR Docket No. 82-624. Gagnon and SPAM both argue that increased interest in AM since 1983 is the changed fact that could not have been anticipated. This increased interest, they claim, requires us to reconsider the justification for eliminating the alternative power standard for AM. We disagree with the petitioner's contention that popularity of a particular emission type within the amateur service community has any bearing on the maximum power that an amateur station should be authorized.[13] The other issues the petitions raise have been addressed previously and will not be discussed here.[14] We conclude, therefore, that neither petition presents a meritorious request for reconsideration.

6. We also conclude that the alternative power standard that expired June 1, 1990, for stations transmitting AM should be deleted from Section 97.313(b) of the Commission's Rules, 47 C.F.R. § 97.313(b). We are including in this *Memorandum Opinion and Order*, therefore, an editorial amendment to Section 97.313(b). Because this amendment merely removes the reference to a superseded rule, the notice and comment provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, are unnecessary.

IV. CONCLUSION

7. In view of the foregoing, and pursuant to the authority contained in Section 1.429(a) of the Commission's Rules, 47 C.F.R. § 1.429(a), IT IS ORDERED that the petitions for reconsideration filed by Dale Gagnon and The Society for the Promotion of Amplitude Modulation ARE DENIED.

8. IT IS FURTHER ORDERED pursuant to the authority contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1), that Part 97 is amended effective **September 9, 1991,** as set forth in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.313(b) is revised to read as follows:

§ 97.313 Transmitter power standards.

(a) * * *

(b) No station may transmit with a transmitter power exceeding 1.5 kW PEP.

* * * * *

FOOTNOTES

[1] *See* 5 FCC Rcd 6374 (1990).

[2] *See* Section 2.201 of the Commission's Rules, 47 C.F.R. § 2.201, for information relating to the system of designating emission types and modulation characteristics of radio waves.

[3] *See Report and Order*, 48 Fed. Reg. 34746 (1983); *Erratum*, 48 Fed. Reg. 37224 (1983); *Erratum*, 48 Fed. Reg. 44814 (1983); *Memorandum Opinion and Order*, 49 Fed. Reg. 36107 (1984) (reconsideration granted in part), *aff'd mem., Baxter v. FCC*, 774 F.2d 510 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1184 (1986).

[4] *See Report and Order* at 1.

[5] *Id.* at 6.

[6] *See* note 3, *supra*.

[7] *See Order*, RM-3665, mimeo 07646 (1981).

[8] SPAM petition at 3.

[9] Gagnon petition at 2, 6.

[10] SPAM petition at 5, Gagnon petition at 4.

[11] SPAM petition at 3-4, 7; Gagnon petition at 2, 5.

[12] The standards applicable to a petition for reconsideration are specified in Sections 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. A petition filed beyond the period specified in Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f), will be entertained only if the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters or the petition relies on facts unknown to the petitioner until after his last opportunity to present such matters. *See* Section 1.106(b) of the Commission's Rules, 47 C.F.R. § 1.106(b).

[13] We note that other emission types such as single sideband analog telephony (emission type J3E, commonly referred to as SSB), amplitude modulated digital telegraphy (emission type A1A, commonly referred to as CW), and frequency modulated analog telephony (emission type F3E, commonly referred to as FM) appear to enjoy much greater popularity within the amateur community than does AM.

[14] The Court of Appeals, in affirming the Commission's decision, found that the Commission considered and rejected a request for a permanent grandfather provision for AM and that nothing in the record indicated the Commission's technical conclusions were erroneous. With respect to petitioner's argument that the rules diminished the value of some of their equipment, the Court stated this objection is clearly incorrect because no person is to have anything in the nature of a property right as the result of the granting of a license. *See Baxter v. FCC*, No. 84-1504, mem. at 2-4 (citations omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GTE AIRFONE INCORPORATED — File No. 20336-CG-P/L-91

For authority to construct and operate an Air-Ground Radio Telephone Service in the 849-851/894-896 MHz Bands

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1991; **Released: July 23, 1991**

By the Chief, Mobile Services Division:

INTRODUCTION

1. On October 22, 1990, GTE Airfone Incorporated (Airfone) filed an application to construct and operate a nationwide Air-Ground Radiotelephone Service. On December 5, 1990, American Skycell Corporation (Skycell)[1] filed a Petition for Conditional Grant against Airfone's application. Skycell requests that Airfone be required to make any and all contracts it has negotiated with airlines available for inspection and that the Commission condition grant of Airfone's license on non-enforcement of any anti-competitive contracts or provisions. Pursuant to the Commission's findings and directive in *Memorandum Opinion and Order* in GEN Docket No. 88-96 (released July 11, 1991), we grant Airfone a conditional 800 MHz air-ground license.

DISCUSSION

2. In January 1981, Airfone was granted an experimental license to provide air-ground radiotelephone service.[2] By 1983 Airfone had begun providing air-ground telephone service to airline passengers and entering into service contracts with various airlines to install air-ground equipment on airplanes. Airfone's contracts currently cover 55-60% of domestic passenger aircraft, with equipment installed on approximately 40% of them. Many of these contracts have expiration dates which exceed the length of Airfone's experimental license.

3. In an attempt to resolve the concerns raised over its contracts, Airfone notified in writing all of its airline customers that it will not require them to purchase or use equipment or services from Airfone for aircraft not already equipped. The Commission, however, in *Memorandum Opinion and Order, supra*, stated that Airfone's notification letters were insufficient to abrogate the competitive hurdles that Airfone's contracts create. The Commission concluded that while Airfone's letters may give an airline the opportunity to choose an alternative air-ground carrier for future installations, it does not permit the airline to remove equipment installed under the experimental license or to contract another carrier for similar equipment. The Commission declared that it was contrary to the public interest for Airfone to restrict competition in the air-ground market by binding airlines to contracts with termination dates that exceed Airfone's experimental license or to require airlines to pay premature contract-termination penalties.[3] The Commission reasoned that airlines should be given the opportunity to choose from which air-ground licensee they wish to receive service. The Commission, therefore, directed that Airfone's regular air-ground license be conditioned on Airfone releasing airlines, at the airlines' request, from service contracts for equipment installed on aircraft prior to July 11, 1991 pursuant to contracts entered into prior to December 24, 1990, without penalty, regardless of any contractual termination provisions.[4] The Commission also ordered that the grant be further conditioned on Airfone, within 30 days of the release of this Order, notifying all affected parties (1) of the above condition; (2) that the airline, or alternative licensee wishing to equip an aircraft, is responsible for the removal costs of any Airfone equipment previously installed under Airfone's experimental license; and (3) that the equipment, upon removal, be returned to Airfone.[5]

4. The action we are taking here will supercede the experimental authority under which Airfone has been operating. Airfone will hereinafter be required to operate according to the rules and regulations established in the *Report and Order* in GEN Docket 88-96, 5 FCC Rcd 3861 (1990) and the *Memorandum Opinion and Order, supra*. Airfone will be permitted to deviate from compliance of these rules and regulations to the extent and time allowed for in the *Memorandum Opinion and Order, supra*.

5. In addition, we find Airfone legally, financially, technically and otherwise fully qualified to hold a regular, *i.e.*, non-experimental, Air-Ground Radiotelephone Service license and that grant of Airfone license as conditioned below would serve the public interest, convenience and necessity.

ORDERING CLAUSES

6. Accordingly, IT IS ORDERED THAT the Petition to Condition Grant filed by American Skycell Corporation IS HEREBY GRANTED to the extent indicated herein.

7. IT IS FURTHER ORDERED THAT the application for authority to construct and operate an air-ground radiotelephone service in the 849-851/894-896 MHz bands filed by GTE Airfone Incorporated, File No. 20336-CG-P/L-91, IS HEREBY GRANTED, conditioned on the following:

(a) Airfone may not take any steps to enforce the contractural termination provision or penalty clauses of the contracts it entered into with airlines before December 24, 1990, for equipment installed prior to July 11, 1991.

(b) Airfone must notify all affected parties within 30 days of the release of this Order of the above condition and that the airline or alternative licensee is responsible for the costs of removing the previously installed Airfone equipment should the airline exercise its option to terminate its pre-December 24, 1990 contract with Airfone and that the equipment shall be returned to Airfone upon removal.

(c) Airfone must comply with all other rules, regulations and requirements found in Part 22 of the Commission's rules, as further explained in the *Report and Order*, *supra*, and the *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Skycell also filed an application for Air-Ground Service on October 22, 1990. Skycell was granted a license for such operation on December 24, 1990.

[2] Airfone was initally formed in 1976 by Mr. John D. Goeken. Mr. Goeken sold Airfone to GTE in 1986.

[3] In Memorandum Opinion and Order, *supra*, the Commission granted, in part, petitions for reconsideration of the Report and Order, 5 FCC Rcd 3861 (1990). One of the petitioners, McCaw Cellular Communications, Inc., asserted that the pool of airlines free to negotiate agreements for air-ground service contracts is severely depleted because of the long-term contracts Airfone was able to obtain under its experimental license. It requested the Commission to invalidate any restrictive provisions in these contracts. The Commission agreed that Airfone's contracts both impede and frustrate the public interest concern of competition. The Commission, therefore, directed the Chief, Common Carrier Bureau, to condition grant of an air-ground license to Airfone to ensure that Airfone refrains from enforcement of the restrictive provisions.

[4] We recognize there may be some concern that Airfone will attempt to bind airlines which entered into contracts with them prior to December 24, 1990 to retain the Airfone equipment by having the airline sign a new contract with only minor adjustments from the original contract. By the condition we are imposing on Airfone's license, we do not intend to allow such minor changes to prevent an airline which had Airfone equipment installed pursuant to a pre-December 24, 1990 contract from chosing an alternative air-ground supplier. Therefore, we will closely scrutinize any complaints from the competitors that Airfone is anticompetitively entering into new contracts with the airlines for the purpose of avoiding the pre-December 24, 1990 cut-off date.

[5] Skycell also requests that Airfone's grant be conditioned on Airfone making its air-ground service available on a resale basis. The Commission in Memorandum Opinion and Order, *supra*, has already required Airfone to offer its service for resale should any licensee desire to purchase such service. Therefore, GTE is required to permit such resale of its service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Southern Virginia Broadcasting Corporation, Former Licensee of Stations WSVS(AM)/WSVS-FM Crewe, Virginia for Forfeiture	File Nos. BR-880531VV and BRH-880531ZQ

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1991; Released: July 23, 1991

By the Commission:

1. The Commission has before it for consideration a Notice of Apparent Liability (NAL) for forfeiture released January 22, 1990, to Southern Virginia Broadcasting Corporation, former licensee of Stations WSVS(AM)/ WSVS-FM, Crewe, Virginia.[1] *Southern Virginia Broadcasting Corporation*, 5 FCC Rcd 438 (1990). The Notice of Apparent Liability for Forfeiture for $15,000 was issued for repeated failures to comply with the Commission's affirmative action provisions. 47 C.F.R. Sections 73.2080(b)(3), (b)(5), (c)(2) and (c)(5).

2. The NAL set out a record of inadequate EEO efforts. Review of the stations' renewal application and inquiry response revealed that the licensee failed to recruit minorities or analyze its efforts to recruit, hire, promote and retain minorities during the period under review. Specifically, the Commission's review disclosed that the licensee solicited no female and minority referral sources for the 15 full-time vacancies occurring between July 1985 and September 1988. The licensee started contacting the Nottoway NAACP only two months before the license term expired and received no applicants from that source. Although the licensee states that it had contacted local colleges during the last three years of the license term, only on-air advertisements and a local newspaper were listed as having referred applicants. In addition, the licensee's recordkeeping was inadequate because, except for the hiree, it did not specify the number, gender or race of applicants in the job pool for its job vacancies. The licensee hired no minorities for any of the 15 vacancies.

3. Southern Virginia Broadcasting Corporation has not responded to the NAL.

4. Accordingly, *IT IS ORDERED*, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Southern Virginia Broadcasting Corporation *FORFEIT* to the United States the sum of fifteen thousand dollars ($15,000) for failing to comply with the Commission's Affirmative Action provisions. 47 C.F.R. Sections 73.2080(b)(3), (b)(5), (c)(2) and (c)(5). Full payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission within 30 days of the release date of this Order. In regard to this forfeiture proceeding, the licensee may take any actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80 and Section 504(a) of the Communications act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The Commission approved a transfer of control of the licenses of Stations WSVS/WSVS-FM from Southern Virginia Broadcasting Corporation to Southern Virginia Broadcasting Corporation, debtor-in-possession on October 25, 1988. On September 26, 1989, the Commission approved an involuntary assignment of the licenses from Southern Virginia Broadcasting Corporation, debtor-in-possession, to Holmes P. Harden, trustee, and a voluntary assignment from Holmes P. Harden to KAT Broadcasting Corporation. The controlling interest in KAT Broadcasting was held by the president of the parent company of Southern Virginia Broadcasting Corporation. On January 3, 1991, the Commission approved an involuntary assignment of the licenses from KAT Broadcasting Corporation to Banking Services Corporation and Roger A. Akin, Esquire, co-receivers.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 91-201

In re Applications of:

SCOTT M. TRENTADUE (hereafter "Trentadue") — File No. BPH-900604MA

MIANNE NELSON (hereafter "Nelson") — File No. BPH-900606MA

FREDERICK W. KINLOW d/b/a F.W.K. BROADCASTING COMPANY (hereafter "F.W.K.") — File No. BPH-900606MF

For Construction Permit for a New FM Station on Channel 293A in Whitewater, Wisconsin

HEARING DESIGNATION ORDER

Adopted: June 26, 1991; Released: July 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Scott M. Trentadue is Vice President of Sales and Marketing for Goetz Broadcasting Corporation, licensee of FM station WSJY in Fort Atkinson, Wisconsin. There is a 3.16 mV/m (70 dBu) contour overlap between WSJY and the proposed station in violation of the "duopoly" provision of 47 C.F.R. § 73.3555(a)(2). Mr. Trentadue has indicated his intent to terminate his relationship with WSJY in the event of grant of the referenced application. Accordingly, in the event of grant of Trentadue's application, he will be required to sever all connections with WSJY prior to commencement of program test authority.

3. The Federal Aviation Administration has determined that Nelson's proposed site may present a hazard to air navigation based upon an electromagnetic interference problem (FAA No. 90-AGL-1165-OE). Also, attempts to obtain FAA clearance through the Commission's Antenna Survey Branch as to whether the antenna proposed by F.W.K. would constitute a hazard to air navigation have been unsuccessful. Accordingly, an issue will be specified with respect to Nelson and F.W.K., and the FAA made a party to the proceeding.

4. Each of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that one of the applicants failed to address the matter of how he proposes to resolve any RF exposure to workers on his tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that he may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Trentadue failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, he will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Trentadue will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessment, that the applicant's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

5. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Nelson and F.W.K. would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Trentadue in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That in the event of a grant of Trentadue's application, Scott M. Trentadue will be ordered to sever all connections with WSJY(FM) prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That, in accordance with paragraph 4 hereinabove, Trentadue shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record. Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Service Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-195

In re Applications of

LENORA ALEXANDER File No. BPH-900102MI
(hereafter "Alexander")

MYM COMMUNICATIONS, LIMITED PARTNERSHIP File No. BPH-900102MJ
(hereafter"MYM")

For Construction Permit
for a New FM Station on Channel 272A
in Strasburg, Colorado

HEARING DESIGNATION ORDER

Adopted: June 24, 1991; Released: July 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Both of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Alexander and MYM failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Alexander and MYM will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

3. Alexander petitioned for leave to amend her application on November 1, 1990. The accompanying amendments was filed after April 23, 1990, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Alexander and MYM in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, in accordance with paragraph 2 hereinabove, Alexander and MYM shall submit the environmental assessment required by 47

C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Alexander IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-200

In re Applications of

NANCY C. HIER (hereafter "Hier") — File No. BPH-900116MU

MARK A. KILMER (hereafter "Kilmer") — File No. BPH-900118MN

MARY A. REYNOLDS (hereafter "Reynolds") — File No. BPH-900118MP

T & L BROADCASTING (hereafter "T & L") — File No. BPH-900118MR

For Construction Permit
for a New FM Station on Channel 235C2
in Hillman, Michigan

HEARING DESIGNATION ORDER

Adopted: June 26, 1991; Released: July 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. All of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that three of the four applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order*, in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Hier, Kilmer and Reynolds failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Hier, Kilmer and Reynolds will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

3. T & L petitioned for leave to amend its application on July 3, 1990. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Hier, Kilmer and Reynolds in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, in accordance with paragraph 2 hereinabove, Hier, Kilmer and Reynolds shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by T & L IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-202

In re Applications of

BAKER COMMUNICATIONS COMPANY (hereafter "Baker")	File No. BPH-900607MA
ROBERT ADELMAN (hereafter "Adelman")	File No. BPH-900607MB
DULOS BROADCASTING, INC. (hereafter "Dulos")	File No. BPH-900607ME
KENNETH B. ORCHARD (hereafter "Orchard")	File No. BPH-900608MK
MOUNT WILSON FM BROADCASTERS, INC. (hereafter "Broadcasters")	File No. BPH-900607MF (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 268B
in Baker, California

HEARING DESIGNATION ORDER

Adopted: June 26, 1991; Released: July 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On December 27, 1990, Broadcasters filed a request that its application be dismissed. Since it attached a declaration of its principal stating that it has neither paid nor received consideration with respect to its dismissal request, its application will be dismissed pursuant to 47 C.F.R. § 73.3568(a).

3. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled " Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that Baker, Dulos, and Orchard did not address the matter of how they would protect workers on their respective towers from RF radiation exposure. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311.47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Baker, Dulos, and Orchard failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, Baker, Dulos, and Orchard will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the respective proposals of the affected applicants will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted with respect to those particular applicants, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

4. *U.S.-Mexican Agreement.* On October 18, 1990, Adelman filed an amendment to his application. Because the Baker allocation is located within 320 kilometers of the U.S.-Mexican border, it is subject to the requirements of the U.S.-Mexican Agreement which limits Class B facilities within the border area. The Baker amendment proposes an effective radiated power ("ERP") of 6.7 kilowatts at 391 meters height above average terrain ("HAAT") which exceeds the limitations of Annex IV of the U.S.-Mexican Agreement ("Maximum Power Versus Antenna Height") for class B facilities. Accordingly, the Adelman amendment will be returned. *See* 47 C.F.R. § 73.3573(c).

5. *EEO.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Dulos has filed such a statement, it is deficient. Dulos has not listed any specific organizations it proposes to utilize to encourage the referral of qualified female job applicants. Accordingly, Dulos will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

6. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Dulos have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna

proposed by Dulos would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Baker, Dulos, or Orchard in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the respective proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Dulos would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Broadcasters application IS HEREBY DISMISSED.

11. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Baker, Dulos, and Orchard shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

12. IT IS FURTHER ORDERED, That the Adelman October 18, 1990 amendment IS HEREBY RETURNED as specified in Paragraph 4 above.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Dulos shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-203

In re Applications of

KENNEDY BROADCASTING, INC. (hereafter "Kennedy")	File No. BPH-900125MQ
GLOBAL MEDIA, INC. (hereafter "Global")	File No. BPH-900125MR
HBA BROADCASTING, INC. (hereafter "HBA")	File No. BPH-900125MT
MJR BROADCASTING LTD PARTNERSHIP (hereafter "MJR")	File No. BPH-900125MV
Jo Maelisa Jones & Tina Elizabeth Jones, A Partnership d/b/a MARTINEZ BROADCASTERS (hereafter "MB")	File No. BPH-900125MW
P.V.R. COMMUNICATIONS, L.P. (hereafter "PVR")	File No. BPH-900125MX
LITTLE RIVER COMMUNICATIONS GROUP, INC. (hereafter "Little River")	File No. BPH-900125MY
ROBERT C. BECKHAM (hereafter "Beckham")	File No. BPH-900125MZ
BIBLE BROADCASTING NETWORK, INC. (hereafter "BBN")	File No. BPED-900125MB (Dismissed Herein)

For Construction Permit
for a New FM Station on Channel 299C2
in Martinez, Georgia

HEARING DESIGNATION ORDER

Adopted: June 26, 1991; Released: July 22, 1991

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *BBN.* Because the channel available for assignment in this proceeding is a Class C2 allotment and BBN filed during the applicable application filing window for a Class C3 allotment (with proposed facilities which do not meet the Class C2 minimums), the BBN application must be dismissed as inadvertently accepted for tender. *See* 47 C.F.R. § 73.203(a); *Report and Order*, MM Docket No. 88-118, 4 FCC Rcd 2413 (1989).

3. *Amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
GLOBAL	January 8, 1991
HBA	May 30, 1991
PVR	August 8, 1990, October 1, 1990, March 6, 1991, April 1, 1991

4. *EEO.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although HBA and MJR have filed such statements, they are deficient. Neither HBA nor MJR has listed appropriate recruitment sources for women. Accordingly, HBA and MJR will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Air Hazard Issue.* The Federal Aviation Administration (FAA) has preliminarily determined that each of the proposed sites of Kennedy, Global, HBA, MJR, PVR, Little River, and Beckham will be a hazard to air navigation based upon an electromagnetic interference (EMI) problem. With particular reference to Global, the FAA has explained that: "[t]he preliminary review revealed a potential Electromagnetic Interference (EMI) problem with respect to intermodulation interference with the Augusta, Georgia, Bush Field Airport Runway 17 localizer facility (I-MZX)." *See* FAA Letter of September 13, 1990 to Global (FAA Aeronautical Study No. 90-ASO-242-OE). Although we have no preliminary FAA determination regarding MB, our attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and MB have been unsuccessful. Accordingly, an air hazard issue will be specified against each of these applicants and the FAA made a party to the proceeding.

6. *Environmental Issue.* Our engineering study indicates that, of all the applicants, only Global has addressed how it would resolve any RF exposure to workers on its respective tower. *See* 47 C.F.R. § 1.1307(b). Consequently,

we are concerned that each of the others may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311.47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since only Global has indicated how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, each of the others will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure To Radiofrequency Radiation," at 28. Accordingly, these applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

7. *PVR.* An engineering study of PVR's application reveals that the proposal does not meet the spacing requirements of 47 C.F.R. § 73.207 with respect to first-adjacent Station WPEZ(FM), Macon, Georgia. The applicant has recognized that it does not comply with § 73.207 and therefore has requested alternative processing pursuant to the provisions of 47 C.F.R. § 73.215.

8. Based upon § 73.215, we have performed an engineering study of the mutual contour protection between PVR's proposal and WPEZ(FM). Our computer generated study, predicated on assumed maximum Class C1 facilities of 100.0 kW ERP/299 m HAAT for WPEZ(FM) and applying the corresponding antenna heights above average terrain between WPEZ(FM) and PVR's proposal, indicates that prohibited contour overlap will occur. In particular, PVR's proposed 60 dBu protected contour will be overlapped by the 54 dBu interfering contour of WPEZ(FM) by as much as 1.15 kilometers between the azimuths of 224.0°T to 244.0°T as referenced from the proposed site. Consequently, we find that PVR's proposal violates § 73.215.

9. However, because we recognize that the wording of § 73.215(b)(ii) does not, for "hard look" processing purposes, afford applicants full and explicit notice of the prerequisites they must meet to avoid summary dismissal, we will not dismiss PVR's application for this rule violation. *Compare Rochelle C. Salzer v. FCC*, 778 F. 2d 869 (D.C. Cir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous) *with Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991) (dismissal affirmed where rules are clear). Instead, we shall specify an appropriate technical qualifications issue against PVR, and PVR may file a curative amendment with the presiding officer pursuant to 47 C.F.R. § 73.3522(b).

10. *MJR.* Section III, Item 3 of FCC Form 301 (June 1989) requires an applicant to specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. MJR has not provided an address or contact persons as requested in Item 3. Accordingly, MJR will be required to submit an amendment which gives all the information required by Section III, Item 3 to the presiding Administrative Law Judge.

11. *Little River.* Samuel Crenshaw, Jr., president and sole voting stockholder of Little River, is currently employed as sports director of Station WRDW-TV, Augusta, Georgia. He has indicated that he intends to resign from WRDW in the event of grant of Little River's application. Because his ownership of the proposed station at Martinez concurrently with his managerial role at the Augusta television facility would potentially violate the Commission's cross-interest policy, *see Martin Lake Broadcasting Co.*, 21 FCC Rcd 180,181-182 (1970), we will place an appropriate divestiture condition upon any grant to Little River.

12. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. *Conclusion.* Except as may be indicated by any issues specified below, the applicants (save for BBN) are qualified to construct and operate as proposed. Since their proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications (except for BBN's) ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Kennedy, HBA, MJR, MB, PVR, Little River, or Beckham in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the respective proposal is consistent with the National Environmental Policy Act, as

implemented by 47 C.F.R. §§ 1.1301-1319; and, if not, to determine the effect thereof on the respective applicant's basic qualifications to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Kennedy, Global, HBA, MJR, MB, PVR, Little River or Beckham would constitute a hazard to air navigation; and, if so, to determine the effect thereof on the respective applicant's basic qualifications to be a Commission licensee.

3. To determine whether PVR's application violates 47 C.F.R. §§ 73.207 and 73.215, and, if so, whether PVR is technically qualified to be a licensee.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the application of Bible Broadcasting Network, Inc. (BPED-900125MB) IS DISMISSED as inadvertently accepted for tender.

16. IT IS FURTHER ORDERED, That, as discussed in paragraph 3 above, the petitions for leave to amend filed by Global, HBA and PVR ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extend indicated herein.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, HBA and MJR shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Kennedy, HBA, MJR, MB, PVR, Little River, and Beckham shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That MJR shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That in the event of grant of Little River's application, Samuel Crenshaw, Jr. will be required to sever all connections with Station WRDW-TV, Augusta, Georgia, prior to the commencement of program test authority.

22. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHRONICLE CELLULAR,
Complainant,

v. File No. E-91-17

METRO MOBILE CTS, INC.,
METRO MOBILE CTS
OF PHOENIX, INC.,
and TUCSON CELLULAR
TELEPHONE COMPANY,
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: July 17, 1991; Released: July 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 19, 1990, Chronicle Cellular, a division of the Chronicle Publishing Company (hereinafter "Chronicle") filed with the Commission the above-captioned formal complaint against Metro Mobile CTS, Inc., Metro Mobile CTS of Phoenix, Inc., and Tucson Cellular Telephone Company (hereinafter "Metro Mobile"). The complaint alleged that Metro Mobile refused to offer reasonable access rates and conditions for subscribers to Chronicle's service who sought to roam on Metro Mobile's adjacent cellular systems. Metro Mobile subsequently moved to dismiss the complaint, contending that it failed to state a cause of action within the Commission's jurisdiction and on which relief could be granted.

2. With the encouragement and participation of the Enforcement Division and the Mobile Services Division, the parties entered into negotiations aimed at resolving their dispute. On July 15, 1991, Chronicle advised the Commission that the parties had reached a voluntary settlement of the matters raised in the proceeding and requested that its complaint be dismissed with prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Chronicle's request to dismiss the above-captioned complaint with prejudice IS GRANTED and the proceeding IS TERMINATED.

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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-116

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 2954

Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan No. 18

ORDER

Adopted: July 9, 1991; Released: July 10, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed Transmittal No. 2954 on March 13, 1991. This transmittal introduces AT&T's eighteenth Competitive Pricing Plan (CPP18) under AT&T Tariff F.C.C. No. 15, scheduled to become effective on July 11, 1991. According to AT&T, CPP18 constitutes its competitive response to an offer made by MCI Telecommunications, Inc. (MCI) to Union Carbide Corporation (Union Carbide). Petitions against this transmittal were filed by the Competitive Telecommunications Association (CompTel), MCI, and US Sprint Communications Company Limited Partnership (US Sprint).[1] For the reasons discussed below, we suspend Transmittal 2954 for the full five-month statutory period.

II. BACKGROUND

2. AT&T contends that this transmittal represents its competitive response to an offer made by MCI to provide Union Carbide with telecommunications services at rates that are significantly below MCI's tariffed rates. According to AT&T, Union Carbide has expressed its intention to accept the MCI offer if AT&T is unable to meet it. AT&T Transmittal 2954, Description and Justification (D&J) at 2, 6.

3. CPP18 would provide Union Carbide with MEGACOM 800 services under usage charges reduced 23.2 percent from charges otherwise applicable under the standard MEGACOM 800 tariffs. CPP18 requires Union Carbide to commit to a three-year term. D&J at 2-6; AT&T Tariff F.C.C. No. 15, Transmittal 2954, Section 20.1, 2nd Revised Page 52.

III. PLEADINGS

A. Petitions

4. CompTel and MCI incorporate by reference their pleadings and petitions against each prior Tariff 15 offering. *See* CompTel Petition at 2; MCI Petition at 4.

5. The petitioners argue that CPP18 fails to satisfy the competitive necessity test[2] upon which AT&T relies as justification for this filing. *See, e.g.*, CompTel Petition at 2; MCI Petition at 4-6. According to MCI, the competitive necessity doctrine applies to service provided to classes of customers, not single customers. Thus, the three-year term requirement and condition that customers must have received MCI's competing offer, combined with AT&T's assertion that MCI has not offered its 800-DAL service at these rates and terms to any other customer, effectively limit CPP18 to a single-customer offering. MCI Petition at 4-5, *citing* AT&T Tariff 15, § 2.1.5.A.3, Joblin affidavit at 5. MCI notes that AT&T's tariff requires the customer to demonstrate its receipt of a substantially similar offer from a competitor, but is silent as to the nature of the demonstration. *Id.* at 5.

6. MCI also contends that because Union Carbide is attached to its non-portable AT&T 800 telephone numbers, AT&T is unlikely to lose the contested inbound calling business absent number portability. MCI argues that MCI's lower prices are thus irrelevant to the customer's purchase decision, so there is no need for AT&T to reduce its prices for standard 800 service to retain revenues that otherwise would be lost to competition. In addition, MCI states that the demand information provided it by Union Carbide consisted only of gross estimates of day/night minutes, while AT&T prepared a bid based upon actual traffic information. MCI made no further proposal to Union Carbide after September 1990, although it states that AT&T apparently did so at the customer's request. *Id.* at 7-9.

7. MCI also asserts that CPP18 is effectively limited to Union Carbide because prospective customers must accept its three-year term and have received MCI's counterpart offer, while MCI has not offered its services to any other customer under the rates and terms offered Union Carbide. Thus, MCI contends AT&T cannot invoke the competitive necessity doctrine. *Id.* at 4-5. Moreover, MCI argues, as CPP18 is not a "new service offering" as defined in Section 61.3(r) of the Commission's Rules, 47 C.F.R. § 61.3(r),[3] AT&T is required to submit a cost of service study under Section 61.38(b)(1) of the Commission's Rules, 47 C.F.R. § 61.38(b)(1), but has failed to satisfy that requirement. *Id.* at 6-7.

8. US Sprint also contends that CPP18 is a customer-specific offering and hence unreasonably discriminatory. US Sprint also argues that the competitive necessity test does not sanction customer-specific offerings and, in any case, that CPP18 fails to satisfy the showing required by the competitive necessity test. First, US Sprint asserts, if MCI's offer is actually priced below CPP18, this demonstrates that AT&T has not found it necessary even to meet the competitor's offer, but effectively preempts competition by narrowing the price differential between its offer and its competitor's. US Sprint states that AT&T's competitors must offer to compensate potential customers for the costs they will incur to change 800 numbers, should they decide to leave AT&T for a different interexchange carrier, and asserts that allowing AT&T to

offer a comparable discount to retain customers will limit competition in the 800 services market. US Sprint Petition at 2-4.

9. As to the second element of the competitive necessity test, US Sprint asserts with MCI that AT&T's offer fails to meet competition without undue discrimination because it restricts the offering to a single customer. US Sprint contends that AT&T's statement of general availability leaves AT&T free to determine what constitutes similar service offered by a competitor, and the basis upon which it will evaluate such offers. Nor, according to US Sprint, has AT&T met the third prong of that test, as it has not demonstrated that the proposed discount contributes to reasonable rates and efficient services for all users. *Id.* at 4-5. US Sprint adds that the Union Carbide offer is an attempt to circumvent price cap regulation by offering nothing more than discounted MEGACOM 800 services in Tariff 15, and suggests the Commission did not anticipate the consequences of selective transfer of price capped services into Tariff 15. Rather than accept the prospect of cross-subsidization and the incremental pricing of Tariff 15 offerings, US Sprint argues, the Commission should prohibit Tariff 15 offerings entirely. *Id.* at 5-8. Finally, Sprint asserts that the Commission has never stated that AT&T may justify Tariff 15 filings using a net revenue test, and in fact stated the contrary in the *Price Cap Order*,[4] so that the absence of the more stringent showing contemplated by conventional tariff review warrants rejection of the AT&T transmittal. *Id.* at 8-9.

B. AT&T Reply

10. AT&T asserts that MCI does not dispute AT&T's understanding of the MCI offer to which CPP18 responds, but suggests instead that AT&T was unlikely to lose the inbound calling business to MCI. AT&T contends its understanding of the competitive situation is reasonable, and that Union Carbide has confirmed it would select MCI if AT&T is unable to offer CPP18. As to US Sprint's contentions respecting the importance of number portability, AT&T states that Union Carbide anticipated replacing its 800 numbers at a newly consolidated customer service center, so that number portability was not a consideration in this instance. AT&T Reply at 2-4. Claims that the Communications Act prohibits single-customer offers, AT&T asserts, are foreclosed by court decisions recognizing such responses to competitors' similarly limited offers. AT&T also contends that if single-customer pricing is lawful for nondominant carriers, it is equally lawful for the dominant carrier. *Id.* at 4-7. In any case, AT&T adds, CPP18 is available to any customer who has been offered the counterpart MCI service. Finally, AT&T asserts there is no prohibition against the use of a net revenue showing to satisfy the cost support requirement of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, and notes the Commission approved that test in the optional calling plan context. *Id.* at 8-9.

IV. DISCUSSION

11. We conclude, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the prohibition against unreasonable discrimination established by the Communications Act. Yet, as the Commission observed at the time it initiated its investigation of the first Tariff 15 offering, the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[5] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

12. We also conclude that the issues raised by CPP18 warrant exercise of our discretion to suspend this transmittal pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of service offerings. In deciding whether to suspend, we must balance the interests of ratepayers, the filing carrier, and the competitive process. On balance, we have decided that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal, and consequently the potential for harm to other ratepayers, outweighs any negative impact that suspension of these rates may have. Therefore, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

13. We will designate the issues to be examined in this investigation in a future Order.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revision filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal No. 2954.

15. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revision filed by AT&T Communications IS SUSPENDED until December 12, 1991.

16. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 91-574 is assigned for this purpose.

17. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 2954 filed by MCI Telecommunications, Inc., and US Sprint Communications Company Limited Partnership ARE DENIED.

18. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 2954 filed by the Competitive Telecommunications Association IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] CompTel Petition to Reject or, in the Alternative, To Suspend and Investigate, filed Mar. 28, 1991 (CompTel Petition); MCI Petition to Reject, filed Mar. 28, 1991 (MCI Petition); and US Sprint Petition to Reject, filed Mar. 28, 1991 (US Sprint Petition). AT&T replied to these petitions on April 8, 1991 (AT&T Reply).

[2] AT&T relies on the competitive necessity test described in the *Private Line Guidelines*. The *Private Line Guidelines* state that, to justify a discriminatory rate on the grounds of competitive necessity, a carrier must show that:

> 1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering;
>
> 2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and
>
> 3) the volume discount contributes to reasonable rates and efficient services for all users.

Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984).

[3] That section defines a new service offering as one:

> . . . that provides for a class or subclass of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers.

[4] Report and Order and Second Further Notice, 4 FCC Rcd 2893 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (AT&T Price Cap Order), *modified on recon.* 6 FCC Rcd 665 (1991), *appeal docketed*, AT&T v. FCC, No. 91-1178 (D.C. Cir. April 15, 1991).

[5] AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7712, 7713 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-83

In re Application of

WILLIAM E. KUIPER, JR. File No. BPH-880125MA

For Construction Permit for
New FM Station, Channel 263A,
Walker, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1991; Released: July 24, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. On July 3, 1991, the Review Board adopted a *Memorandum Opinion and Order*, FCC 91R-61 (released July 11, 1991), approving a global Joint Request for Approval of Settlement Agreement in the captioned proceeding. The Board there granted the application of William E. Kuiper, Jr. (Kuiper), and terminated this proceeding. However, subsequent to the adoption of this *Order*, the Board received a Contingent Petition for Leave to Amend and Proposed Amendment filed by Kuiper with the Secretary of the Commission on July 2, 1991. This amendment proposes to withdraw Kuiper's integration pledge to the facility here, and to modify his divestiture pledge. The Commission's Mass Media Bureau supports Kuiper's request, noting that Kuiper's proposed amendment is consistent with Commission policy established in *Ruarch Associates*, 103 FCC 2d 1178 (1986), and is timely filed prior to the impending Commission deadline (August 1, 1991) for such requests enunciated in *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 91-154, released May 15, 1991.

2. Pursuant to 47 CFR § 1.113(a), the Board, on its own motion, will modify its prior *Order* to the extent that: (1) Kuiper may withdraw his integration pledge made with respect to the facility at Walker, Michigan; and (2) Kuiper may retain his employment and positions as an officer and director at Dowagiac Broadcasting Company, Inc., licensee of WDOW (AM) and WDOW-FM, Dowagiac, Michigan, as well as Kalamazoo Broadcasting Company, Inc., licensee of WKPR (AM), Kalamazoo, Michigan. However, because of prohibited overlap of signals (pursuant to 47 CFR § 73.3555), Kuiper will be required to resign as an officer and director of Furniture City Broadcasting Corp., licensee of WFUR (AM) and WFUR-FM, Grand Rapids, Michigan (facilities in which he holds no ownership interest), prior to the time Program Test Authority is granted for the instant facility.

3. ACCORDINGLY, IT IS ORDERED, That, on its own motion, pursuant to 47 CFR § 1.113(a), the Review Board MODIFIES its prior *Memorandum Opinion and Order*, FCC 91R-61, in this proceeding to the extent indicated herein; and,

4. IT IS FURTHER ORDERED, That the Contingent Petition for Leave to Amend and Proposed Amendment filed by William E. Kuiper, Jr. on July 2, 1991 IS GRANTED, and the amendment IS ACCEPTED to the extent indicated herein; and,

5. IT IS FURTHER ORDERED, That the following condition shall be affixed to the Construction Permit of William E. Kuiper, Jr., for his proposed new FM facility at Walker, Michigan (File No. BPH-880125MA):

> Prior to grant of Program Test Authority, William E. Kuiper, Jr., shall resign as an officer and director of Furniture City Broadcasting Corp., licensee of WFUR (AM), and WFUR-FM, Grand Rapids, Michigan.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-145

In re Applications of

RADIO LUMPKIN, INC.	File No. BPH-891214MI
DIXIE BROADCASTING CORPORATION	File No. BPH-891214MK
GEORGIA WOMEN IN BROADCASTING, Limited Partnership	File No. BPH-891214MO
PATRICIA C. CANNINGTON	File No. BPH-891214MP
LUMPKIN BROADCASTING PARTNERS	File No. BPH-891214NC

For Construction Permit for
New FM Station, Channel 257C2,
Lumpkin, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1991; Released: July 24, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. By *Memorandum Opinion and Order*, FCC 91M-2127, released July 10, 1991, Administrative Law Judge Edward J. Kuhlmann (ALJ) granted a universal settlement agreement in the captioned proceeding, awarded the construction permit formerly at contest to Radio Lumpkin, Inc. (Lumpkin), and terminated the proceeding. However, subsequent to the issuance of this *Order*, Lumpkin filed a "Request for Relief Under the *Ruarch* Policy" with the ALJ, seeking to rescind its previously-made integration pledge of corporate principals proposing to be active in ownership and management. The ALJ opined, however, that with the issuance of his *Order*, he no longer had jurisdiction over this proceeding. Thus, Lumpkin has filed a similar request with the Board (on July 11, 1991).[1]

2. The Board will grant the relief requested, and Lumpkin may withdraw its integration pledge. Lumpkin's pleading is consistent with Commission policy established in *Ruarch Associates*, 103 FCC 2d 1178 (1986), and is timely filed prior to the impending Commission deadline (August 1, 1991) for such requests enunciated in *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 91-154, released May 15, 1991.

3. ACCORDINGLY, IT IS ORDERED, That the "Request for Relief Under the *Ruarch* Policy" filed by Radio Lumpkin, Inc., on July 11, 1991 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] In its request, Lumpkin does not identify the Presiding Officer in this proceeding, and claims that a copy of the *Order* granting the universal settlement agreement "is attached hereto." It is not. Lumpkin also appears to be under the misimpression that July 1, 1991 was the deadline for filing such *Ruarch* requests. It is not. *See* para. 2, *infra*. Lumpkin also does not identify the corporate principal(s) who no longer propose to be integrated into ownership/management.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-293

In re Application of

MARGARET ESCRIVA File No. BPH-871124MG

SPACECOM, INC. File No. BPH-871124MW

For Construction Permit for a
New FM Station on Channel 223A
in Topeka, Kansas

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1991; Released: July 25, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it the *Initial Decision* of Administrative Law Judge Joseph Chachkin (ALJ), 6 FCC Rcd 955 (1991)(*I.D.*), in the above-captioned proceeding. It also has the exceptions and replies of the parties. Oral argument was held on May 17, 1991.

BACKGROUND

2. For reasons that will progressively clarify hereinbelow, the ALJ added and tried against Escriva the following issues:

> 1. To determine whether Margaret Escriva misrepresented or exhibited lack of candor to the Commission is failing to disclose the role of her fiance, William Cordell, in exercising control over her proposal, and whether he is the real party in interest to the application of Margaret Escriva.
>
> 2. To determine whether Margaret Escriva misrepresented or exhibited lack of candor to the Commission in certifying her financial qualifications to the Commission.
>
> 3. To determine in light of the evidence adduced under the foregoing issues, the effect thereof upon Margaret Escriva's basic qualifications to be a Commission licensee.
>
> 4. To determine whether Margaret Escriva is financially qualified to construct her proposed facilities.

3. The above issues were inevitable and all but self-generated because the particular facts surrounding Escriva's (belated) certification of her financial qualifications raised substantial and material questions as to both Escriva's claim to a sole proprietorship and to the reliability of her financial resources. As the *I.D.* narrates, Escriva's interest in this Topeka frequency was promoted by her then-colleague, and current fiance, William Cordell, a communications engineer with whom she first became acquainted while both were employed together at KTRH-AM and KLOL(FM), Houston, Texas. *I.D.*, paras. 64-67. But, alas, when Escriva filed her Topeka application in November 1987, she had no financing whatever for the proposed new radio station, and she apparently did not even begin to seek financing until *after* she had filed. *See id.*, para. 87. In fact, on her Topeka application, Escriva actually certified "no" as to her access to the approximately $300 thousand she had estimated as necessary to meet the Commission's basic financial qualification standard.[1] Upon thereafter being rejected for loans by several commercial banks, as well as by Broadcast Capital Funds, Inc. and the Minority Broadcast Investment Corporation, *see id.*, paras. 87-89, Cordell stepped in with a personal loan offer of $185 thousand which, augmented by an equipment lease proposal from Giesler Broadcast Supply, prompted Escriva to amend her application in February 1988 to attest that she was, then, financially qualified. *Id.*, para. 92.

4. Perchance, and on the very same November 1987 date on which Escriva filed her (unfunded) Topeka broadcast application, Cordell filed on his own (d/b/a Spectrum Corp.[2]) for another new FM broadcast frequency in Abilene, Texas.[3] Although Cordell had initially coveted an equity interest also in Escriva's Topeka station in return for the $185 thousand loan, *id.*, para. 94, he later agreed, it is said, to lend the $185 thousand in cash to Escriva without any ownership interest. However, in light of his own pending Abilene FM application, Cordell was "uncertain" (in early 1988) whether he had adequate personal resources to loan the $185 thousand to Escriva, *plus* the additional $165,000 Cordell (then) considered necessary to finance his own proposed new station in Abilene. But, after some consultation with his accountant, Cordell claimed that he could personally finance both his and Escriva's pending broadcast proposals at the same time.[4]

5. The ALJ has related that, in February 1988, Cordell professed to have "[t]otal net liquid and liquidable assets of $448,500." *Id.*, para. 126. These were reckoned as follows:

Cash in checking and savings accounts	$115,750
Note receivable	$ 30,000
Investments in common stock and other marketable securities	$ 44,800
Cash held in bank account of 100%-owned company	$ 10,000
Net realizable value of [Spectrum Corp.]	$250,000
Less: current portion of note payable and consumer debt	($2,000)
Total net liquid and liquidable assets	$448,550

6. Of these ostensible assets, the purported $250 thousand "[n]et realizable value" of Cordell's Spectrum Corp. was said to have been based on a "firm offer" of purchase

from a "competitor," Shaffer & Associates, Inc. No additional valuation of Spectrum Corp. was provided, and the record below is bereft of any other reference data (*e.g.*, 1987 profit and loss statement; income, asset, or cash flow figures, *etc.*) or independent appraisal by which to corroborate the notion of a $250 thousand "realizable" worth of Spectrum Corp. *See id.*, paras. 127-128. Further, although Cordell claimed to have "unrestricted access," *see id.*, para. 130, to the $115 thousand held, in indeterminate part, in several Spectrum Corp. business accounts, the hearing record does not indicate the actual nature of those accounts or report as to whether all (or what portion) of those funds might have been merely reserves to satisfy any near-term operational obligations of Spectrum Corp., a rather distinct possibility because a large portion of Spectrum Corp.'s business consisted of leasing rooftop locations from Houston area building owners, and, in turn, sub-leasing those same rooftops sites to "a large number of broadcast, two-way and microwave clients." *Id.*, at paras. 40-41.

7. Notwithstanding, and in part (we presume) because the inquiry concerning Escriva's February 1988 positive financial (re)certification was technically framed as a "lack of candor" issue (*see supra* para. 2, Issue 2), the ALJ concluded:

> that Escriva certified her financial qualifications in good faith. At the time that she certified, she had written a budget, a written equipment lease proposal, an executed, firm loan commitment, and a financial statement from her lender. In assessing her qualifications, she reasonably relied on the advice of a certified public accountant. It is thus clear that prior to filing her application, Escriva engaged in serious and reasonable efforts to ascertain the predictable costs of construction and operation and gave thought to the sources of funds to meet these costs. *See Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990). Therefore, Escriva "cannot be seen to have engaged in misrepresentation." *Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988). *See also*, *Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562 (Rev. Bd. 1990).

I.D., at para. 151. Indeed, the ALJ further accepted as objective fact that, when Cordell offered to loan $185 thousand in cash to Escriva (in addition to funding his own pending Abilene broadcast proposal), Cordell *could* rely upon the full purported value and assets of Spectrum Corp. to fund (both) the Topeka (and Abilene) radio station venture(s). *See id.*, paras. 152-161.

EXCEPTIONS

8. Among the multiple exceptions Spacecom has lodged against the *I.D.*, none except the favorable resolution of Escriva's financial qualifications would seem to require further evidentiary amplification. It is true, as Spacecom contends, that much in this record creates skepticism that Cordell is not, and will not become, a *de facto* principal in any Escriva broadcast station.[5] Still, and concerning the financial question upon which the record does need much critical supplementation, even Spacecom's various arguments come into collision with themselves. Notably, though much of Spacecom's rubric pertaining to the real-party-in-interest issue is directed toward debunking the suggestion that Cordell and Escriva will maintain a "commuter marriage," she in Topeka and he in Houston, *see I.D.*, para. 59, Spacecom itself insists (under the financial issue) just as strenuously that[6]:

> The singular glaring and insurmountable flaw which requires rejection of [Spectrum Corp.] as a source of funding for Escriva is that it is Cordell's proprietorship, his principal livelihood. The ALJ erroneously overlooked the absolute inherent incredibility of Cordell selling his day-to-day business in order to make good on his loan to Escriva for a project in which, allegedly, he would have no interest. The ALJ should have found that it is beyond credulity to expect that Cordell would deprive himself of his very livelihood in order to honor his loan commitment. *Belying any intent to sell his business, Cordell himself testified that even if Escriva were to move to Topeka, he could not leave Spectrum Engineering because its clientele is in Houston and elsewhere in Texas.*

9. It is in this latter argument that we find both paradox and merit. There is no debate here that, had not Cordell been credited with a $250 thousand asset for the "liquidable" value of Spectrum Corp., Escriva could not have been found financially qualified. *See I.D.*, paras. 126-137. That is a problem here for several reasons. First, in a conscious and energetic effort to deflect any implication that he was a real party to Escriva's Topeka application, Cordell unbosomed that[7]:

> Ms. Escriva and I were engaged in September, 1988, and I hope to marry her very soon. I love her very much and hope she finally completes her dream of owning, managing and programming a facility the way we all discussed when we were employees of KTRH. I hope to marry Ms. Escriva later this year (hopefully September of this year). If Ms. Escriva does receive the construction permit for Topeka, I will be taking a good many trips to Topeka. *I cannot leave Spectrum Engineering for its client base and the majority of the sites managed are in Houston and the Texas area.* I consider this application and possible construction permit to be Ms. Escriva's dream. I have no ownerhsip interest in the proposed facility and have had none since Ms. Escriva's dream started. If the facility is granted to Ms. Escriva, she will retain all ownership and all rights to the facility after our marriage. It would not have be right to "one-half" her dream just because we were married.

Although Cordell apparently indicated at hearing that he would sell Spectrum Corp. to finance the Topeka application (and the then-pending Abilene, Texas application), *see* Tr. 677 (oral argument), it appears from Cordell's sworn written testimony that he had no real intention, then or now, to actually sell Spectrum Corp. to provide the necessary cash for Escriva's station (or his own). And, indisputably, without realizing $250 thousand cash from the sale of Spectrum Corp., its theoretical "asset" value would not be the device to finance Escriva. That could come only if there *were* a sale, and for nearly that amount. The apparent contradictions in Cordell's financing plans are not satisfactorily resolved on this record.

10. Second, other than the purported "firm offer" of Shaffer & Associates in February 1988 to purchase Spectrum Corp., the record contains no demonstrative evidence of the true market value of that business (even if we were to put aside, *arguendo*, the central contradiction discussed in the previous paragraph). Upon closer inspection, we find unpersuasive on this record the claim of a "firm" $250 thousand "liquidable" value for Spectrum Corp. This claim is based exclusively upon a one-paragraph letter of February 11, 1988 from Joseph W. Shaffer that appears to us, as it did to Spacecom, as little more than a casual offer to possibly negotiate some species of transaction.[8] More disconcerting, and according to Escriva herself, the Shaffer negotiations never advanced very far, dying "a natural death" almost immediately. Tr. 534. All circumstances considered, Spacecom contends that Cordell could not rely upon a (hypothetical) $250 thousand from the (equally problematic) sale of Spectrum Corp. to finance the construction and initial operation of two FM broadcast stations. The $250 thousand, urges Spacecom, is no more than "a figment of accounting," upon which not even Cordell truly relied as *the* resource that would finance the two new FM broadcast stations.

11. Further, as to the $115 thousand said to repose in various bank accounts (*see supra* para. 5), Spacecom maintains[9]:

> The ALJ erroneously accepted the entry of $115,750 without question or comment in his Initial Decision. Hearing testimony revealed, however, that this entry includes funds on deposit in the company operating accounts for Spectrum Engineering. The accounts are used for the deposit of rental receipts from tower site leases, and for payment to landowners and tower owners. Thus, the ALJ wrongly concluded that credit can be given for the full amount of the cash shown on Cordell's financial statement, despite the fact that some portion of the amount is held for the benefit of third parties in the ordinary course of business. Put succinctly, it is not Cordell's cash.

In other words, Spacecom contends that all (or most) of that $115 thousand was not available to Cordell to finance the two broadcast stations, since it represented merely amounts collected from Cordell's sub-lease tenants, much (if not most) of which would be remitted to the Houston area building owners from whom Cordell had leased these rooftop sites as the primary lessee. Again, the record on the nature and purpose of these "cash" accounts leaves wide open the validity of Spacecom's assertion that Cordell's alleged reliance on the $115 thousand cash as fully available to finance Escriva's (and his) broadcast station(s) was hollow.[10]

DISCUSSION

12. Putting aside for the moment the much more subjective question of whether Escriva herself intentionally "lacked candor" when, in February 1988, she amended her application from a negative financial certification to a positive one, the current record, highlighted by the exceptions, makes it impossible for the Board to conclude that the preponderance of the record evidence supports the conclusion that Escriva was financially qualified when she so (re)certified in February 1988. While we are always hesitant to remand a completed hearing proceeding, and frequently seek to avert that result by requesting record supplementation at the Board level, *see, e.g., A. P. Walter, Jr.*, 5 FCC Rcd 5586 (Rev. Bd. 1990); *Colonial Communications, Inc.*, 5 FCC Rcd 51 (Rev. Bd. 1990), we believe that the scope and character of the evidence necessary to find that Escriva was, in fact, basically qualified will require the facilities of a hearing forum.

13. Initially, we are troubled that Cordell's testimony regarding his intentions with respect to Spectrum Corp. was ambivalent, to say the least. On the one hand, Cordell's written testimony was adamant that the singular reason he could not join Escriva in Topeka was that his business, Spectrum Corp., was in Houston, where his personal attendance was imperative to the functioning of that ongoing business. On the other hand, without the sale of Spectrum Corp. for a price at (or near) $250 thousand, Cordell could not have then provided Escriva with the $185 thousand loan necessary for her to claim that she herself was financially qualified. Thus, unless Cordell actually planned to sell Spectrum Corp. to finance the two pending broadcast ventures,[11] it seems to us virtually immaterial, as a practical matter, what the hypothetical value of Spectrum Corp. was in February 1988. The apparent contradictions in Cordell's concept of how he would, *in fact*, finance these stations must be further explored, especially in light of Escriva's testimony that the so-called "negotiations" to sell Spectrum Corp. to the sole prospective purchaser identified by Cordell, Shaffer & Associates, died a quick and "natural death." This apparent paradox must be examined further and fully.

14. Next, the meager evidence supplied by Escriva does not persuasively establish a $250 thousand "quick sale" value of Spectrum Corp. The single-paragraph letter from Shaffer, even on its face, makes no such clear cash (or equivalent) offer; and the Board has indicated in previous cases that a purported offer to purchase a critical asset intended to finance a broadcast proposal must be examined closely to determine whether it has objective validity and empirical substance. In this, the Board is both chastened and instructed by the Commission's action in *Opal Chadwell*, FCC 88I-045, released May 5, 1988, where, despite the fact that an applicant had produced *sworn* written evidence of offers to purchase non-liquid assets (*i.e.*, real estate and a cable television system), the evidence was deemed inadequate. The Commission there stated (*id.*, at para. 6):

> In some circumstances it might be reasonable to accept an offer to purchase at a specified price as an adequate substitute for an appraisal, especially where the claimed value of the property was several times that of the funds required. *See Kaye-Smith Enterprises*, 98 FCC 2d 670, 678 ¶ 7 (Rev. Bd. 1984); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706 ¶ 4 4 (Rev. Bd. 1982). However, in other circumstances, there might be reasons not to consider an offer an adequate substitute. A specific offer may reflect the subjective value of the asset to the prospective buyer, but it may exceed the asset's objective market value. *See Muris, Cost of Competition or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. Legal Studies 379 (1983). Hence, if one or both of the offers could not be effectuated, it is uncertain whether Chadwell could find another buyer at the same price. Therefore, Chadwell may

> wish to furnish formal appraisals to substantiate the objective market value of her property that she claims on the basis of the purchase offers from U.S. Television and Swim-Spa of Texas to alleviate any uncertainty.

It thus solicited further evidence so as to afford Chadwell an opportunity to "furnish formal appraisals to substantiate the objective market value" of the assets relied upon for broadcast financing. But even upon receiving additional evidence, including appraisals, a remand hearing was ordered because the Commission remained unsatisfied that the market value of Chadwell's assets were, in fact, sufficient to finance her broadcast proposal. *Opal Chadwell*, 4 FCC Rcd 1215 (1989). We must demand no less here, and will require that any independent appraisal of the 1987-88 market asset value of Spectrum Corp. be accompanied by a thorough and financially-specific breakdown of the basis for any such appraisal(s).[13]

15. Finally, and particularly in light of the nature of Cordell's rooftop leasing business as well as the testimony of Cordell's own accountant (*see supra* note 11), it is far from clear that Cordell intended to rely upon, or could have relied upon, the said $115 thousand held in Cordell's (and/or Spectrum Corp.'s) bank accounts. If a goodly portion of these "cash accounts" was simply transitional funds, passing regularly through Spectrum Corp. from Cordell's lessees on to the prime rooftop lessors, then an explanation is necessary as to why Cordell claimed to consider these funds as available to personally finance broadcast construction. The record in this respect is patently deficient, and a closer examination is necessary before we can say whether the 1988 claim of $115 thousand in available cash was real or merely illusory.

16. We therefore ask the ALJ to compile testimony and documentary evidence on the open questions we have discussed, and to issue a Supplemental Initial Decision that explicates the complete and accurate state of Cordell's 1988 finances, and illuminates as well his true intentions in February 1988 with respect to the actual manner of financing the two proposed stations. *See Opal Chadwell, supra.*

17. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for further hearing in accordance with this opinion and for preparation of a Supplemental record; and

18. IT IS FURTHER ORDERED, That the issues ARE ENLARGED as follows:

> 1. To determine whether Escriva could rely upon the assets of William Cordell for the loan necessary to be financially qualified for a broadcast construction permit; and
>
> 2. To determine, in light of the above, whether Escriva was financially qualified in February 1988 when she so amended her application.[13]

19. IT IS FURTHER ORDERED, That the burden of proceeding and proof SHALL BE on Margaret Escriva.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Under the (now-abandoned) financial "certification" regime, it seems that the Mass Media Bureau would accept and process new broadcast applications even if the applicant affirmatively swore it was *not* financially qualified. It seems also, for reasons entirely unexplained, that the post-filing treatment of financially unqualified applicants differed, depending on whether the applicant sought a TV station, an AM radio station, or an FM radio station. And, again for unexplained reasons, the treatment seemed to differ depending on whether the applicant certified "no" as to financial qualifications, or merely left the "yes" and "no" boxes blank. *See Revision of Form 301*, 4 FCC Rcd 3853, 3867-68 n.71.

[2] Actually, Cordell was and is the sole proprietor of two similarly named operational entities, to wit: (1) Spectrum Engineering Company; and (2) Spectrum Communications & Engineering, Inc. *I.D.*, paras. 40-41. As did the ALJ, and for purposes of simplicity, we will refer to these Cordell-owned entities as "Spectrum Corp.," since the operational duality appears to have no significance for our present purposes.

[3] It was not until November 1988 that Cordell abandoned his Abeline, Texas application, when he simply failed to enter an appearance in the Abeline case. *I.D.*, para. 44.

[4] As a matter of law, an applicant must have the ability to finance *any and all* applications simultaneously on file with the FCC. *See, e.g., Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 77-79 (Rev. Bd. 1990), *recon. denied*, 6 FCC Rcd 1260 (1991). Here, it is undisputed that Cordell planned to self-finance his Abilene, Texas proposal, plus provide the major cash funding ($185 thousand) for Escriva's Topeka radio station.

[5] For example, Spacecom's Exceptions (at 36-37) adumbrate that:

> Cordell has been an active participant in the formulation of the Topeka proposal. Cordell was the very catalyst for Escriva's project. He:
>
> -- told her about the mechanism for applying for a new broadcast station,
>
> -- supplied her with a list of communities for which a filing window was open,
>
> -- recommended the same FCC counsel which he used to apply for his Abilene construction permit, and with whom he had a former broadcast co-owner relationship.
>
> -- recommended the same consulting engineer which he used to apply for his Abilene construction permit and advanced the consulting engineer a retainer for Escriva,
>
> -- did the "leg work" for the engineering exhibits submitted with the Abilene and Topeka applications,
>
> -- assisted in the location and leg work on a number of subsequent transmitter sites for Escriva's application.
>
> -- provided the financing.

Moreover:

-- Escriva has no familial or business ties to Kansas and had never been there before her application was filed. Escriva Ex. 4 p 2-3, Tr. 49.

-- Cordell has significant ties to Kansas. His parents and other relatives were born there, and many still live there, not far from Topeka. *Id., Tr. 369, 624. Cordell has a number of clients in Kansas, including Motorola and Crown Center in Kansas City. Tr. 624-625.*

-- Cordell assisted his mother with her application for a new FM station at Olathe, Kansas. Tr. 624- 627.

-- Cordell and Escriva visited Kansas together in November 1988. Escriva Ex. 4 p 25, Tr. 59.

-- Cordell has indicated that he will provide engineering services for the Topeka station if requested. Cordell De. Tr. 43.

-- The loan agreement prevents Escriva from settling this proceeding without Cordell's consent, Escriva Ex. 2 p 8, ¶ 5.2.(d), and Cordell has consistently disapproved of settlement by any means. Tr. 404-409.

-- Cordell continued to fund prosecution of Escriva's application beyond the $33,000 limit on expenses for procurement of the construction permit contained in the loan agreement, to the level of $47,450 by February 1990. Escriva Ex. 2 p 17, Tr. 332.

-- Cordell and Escriva are together 24 hours a day, operating Spectrum Engineering and maintaining a common household, and are planning a lifetime together.

[6] Spacecom Exceptions at 18 (footnote omitted; emphasis added).

[7] Escriva Exh. 5 at 14-15 (Sworn Testimony of William E. Cordell) (emphasis added).

[8] *See* Escriva Exh. 6, Attachment F.

[9] Spacecom Exceptions at 22-23 (Transcript citations omitted).

[10] Spacecom's contention gains substance from the testimony of Cordell's accountant, who upon examination at hearing responded as follows (Tr. 576-577; emphasis added):

> Q. Now, let me refer to you page 3 of your direct written testimony, paragraph 9. You reflect there that Mr. Cordell had $115,750 in cash and checking and savings accounts. Was the sum of that amount all in Mr. Cordell's name personally?
>
> A. Yes, sir.
>
> Q. Was any of that in the name of William Cordell doing business as Spectrum Engineering Company?
>
> A. That is the same thing as him being--as his personal account.
>
> Q. How many different accounts does Mr. Cordell maintain?
>
> A. Specifically, I do not know. Approximately five.
>
> Q. All right. And can you give me the name on each of the accounts.?
>
> A. It would be either William Cordell or Bill Cordell.
>
> Q. Is any of them named as William Cordell or Bill Cordell d/b/a Spectrum Engineering Company?
>
> A. Probably one or two are, but a d/b/a is a continuance of the individual. It is not a separate legal entity. So, all the cash of the d/b/a belongs to the proprietor or the owner.
>
> Q. And would the accounts of a d/b/a or the proprietor or the owner be used by the owner as an operating account for the d/b/a?
>
> A. It would be used as both an operating account for the d/b/a and for his own personal account. There is no differentiation.
>
> Q. Because Mr. Cordell does business as a proprietor of Spectrum Engineering Company, his entitlement to the funds is not restricted or limited between his personal use or his business use for the company. Is that correct?
>
> A. That is correct.

[11] We do not say that, assuming that Spectrum Corp. did have a proven market asset value of (at least) $250 thousand, Cordell might not have proposed borrowing against his business to produce the financial support necessary for the two pending broadcast proposals. But the record here reflects that no such alternative capitalization device was contemplated by Cordell, at least according to his given testimony. Only an outright sale.

[12] Unfortunately, the Board has reviewed cases in which alleged "offers to purchase" non-liquid assests turned out to be utterly illusory or in the nature of an "accommodation letter" of a third party seeking to assist an applicant with an empty "offer to purchase" at a questionable price. *See, e.g., California Broadcasting Corp.*, 2 FCC Rcd 4175, 4190-92 (Rev. Bd. 1987) (alleged $2 million "sale" of real estate), *review denied*, 6 FCC Rcd 283 (1991); *cf. Coastal Broadcating Partners*, 5 FCC Rcd 734, 735-36 n.3 (alleged $900 thousand "sale" of stamp collection). We do not say that is the case here: we merely find, as did the Commission in *Opal Chadwell*, that the record contains insufficient evidence to determine whether Spectrum Corp. carried a market asset value of $250 thousand, since nothing else on the record even hints the size and/or value of that business, or the underlying commercial basis for any market value.

[13] Because the Board has been advised by letter of May 24, 1991 that the parties have actively discussed, and would continue to discuss, an amicable settlement of this case, and in view of the major settlement rule change slated to occur on August 1, 1991, *see Admendment of Section 73.3525 of the Commission's Rules*, FCC 91-155, released May 15, 1991, we have provided an advance copy of this order to the parties, who may yet wish to culminate their negotiations prior to August 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WTG-CENTRAL, INC. and
WTG-WEST, INC.,
Complainants,

v. File No. E-89-02

SOUTHWESTERN BELL
TELEPHONE CO.,
Defendant.

ORDER

Adopted: July 18, 1991; Released: July 24, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 7, 1988, WTG-Central, Inc. and WTG-West, Inc. (hereinafter "WTG") filed with the Commission a formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages for alleged overcharges and violations of the Communications Act, SWBT's FCC access tariff and Commission rules and policies. In accordance with Commission rules governing formal complaint proceedings, SWBT filed an answer to the complaint and requested that the complaint be dismissed with prejudice.

2. The parties, with the encouragement and participation of the Enforcement Division, entered into discussions aimed at settling the matters in controversy. As a result of these negotiations, the parties state that a mutually agreeable settlement of this matter was reached. On July 16, WTG filed a motion seeking dismissal of its complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss the above-captioned complaint with prejudice IS GRANTED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File Nos. E-91-44
E-91-45

SOUTHERN SATELLITE
SYSTEMS, INC.
and NETLINK USA,
Defendants.

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File No. E-91-46

UNITED VIDEO, INC.,
Defendant.

ORDER

Adopted: July 18, 1991; Released: July 24, 1991

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 21, 1991, National Rural Telecommunications Cooperative ("NRTC"), filed motions to accept a "Supplemental Reply" in the above-captioned proceedings. In joint filings on July 1, 1991, such request was opposed by Southern Satellite Systems, Inc. ("Southern") and Netlink USA ("Netlink") with respect to the File Nos. E-91-44 and E-91-45 proceedings and by United Video, Inc. ("United") and Superstar Connection ("Superstar") with respect to the File No. E-91-46 proceeding. On July 10, 1991, Southern and Netlink jointly filed a supplement to their opposition. Similarly, United and Superstar supplemented their opposition by a joint filing on July 11, 1991. Following a meeting with Enforcement Division officials on July 12, 1991, NRTC indicated that it wished to formally withdraw its motions to accept supplemental replies and the supplemental replies it had tendered for filing in the proceedings.

2. Accordingly, and good cause appearing, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motions filed by NRTC on June 21, 1991 for leave to file supplemental replies in these proceedings ARE DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 429

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: July 12, 1991; Released: July 12, 1991

By the Chief, Common Carrier Bureau:

1. On April 16, 1991, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 429 to introduce a DS3 Channel Termination offering called the "DS3G Service Arrangement". The DS3G Service Arrangement allows the provision of between one and 12 Special Access DS3 high capacity channels between a single customer premises and the associated Bell Atlantic serving wire center. The DS3G Service Arrangement will be offered under either a three- or a five-year term agreement, and is available with either an electrical or optical interface. Bell Atlantic Description and Justification (D&J) at 1-2. The tariff transmittal is scheduled to become effective on July 15, 1991.

2. On May 1, 1991, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Transmittal 429. Sprint asserts that Bell Atlantic has not justified its recurring rate for this service because its net revenue test showing does not explain its costs. Sprint also notes that Bell Atlantic's cost showing does not conform with the *LEC Price Cap Reconsideration Order* requirements for new services.[1] Sprint Petition at 2 n. 1. Sprint also contends that Bell Atlantic has not provided adequate cost justification for its nonrecurring charges and that such showing must comply with the Commission's *NRC Order*.[2] According to Sprint, Bell Atlantic should provide a time and motion study for its nonrecurring charges. *Id.* at 3-4.

3. Sprint next argues that Bell Atlantic's volume discounts will enable AT&T to use discounted DS3s for local transport of Switched Access services. *Id.* at 3. Sprint essentially contends that this, coupled with unsupported costs, blurs the distinctions between Special and Switched Access, and will have a grave effect on competition. *Id.* Finally, Sprint notes that AT&T will be in the best position to utilize the volume discounts offered by this service. This position, Sprint argues, gives AT&T a competitive advantage and the ability to "ratchet" these facilities to the disadvantage of competitors. *Id.* at 3-4.

4. Bell Atlantic responds that its recurring costs are fully cost justified, and includes a showing of compliance with the net revenue test. It also notes that it has provided supplemental cost information in compliance with the *LEC Price Cap Reconsideration Order*, as well as adequate cost support for its nonrecurring charges. Bell Atlantic Reply at 1-3. Finally, Bell Atlantic asserts that its offering contains no discrimination against competitors of AT&T since the offering is generally available to interexchange carriers other than AT&T. *Id.* at 4. It also notes that other LECs already offer DS3 rate plans with comparable economies for orders of up to 12 channels. *Id.*

5. The Common Carrier Bureau has reviewed Bell Atlantic's Transmittal 429, the petition filed by Sprint, Bell Atlantic's reply, and additional material submitted by Bell Atlantic in support of its rates for this service. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

6. Therefore, IT IS ORDERED that the petition to reject or suspend and investigate the Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 429, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *Citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir June 14, 1991) (*LEC Price Cap Reconsideration Order*).

[2] *Citing* Investigation of Interstate Access Tariff Non-Recurring Charges, Phase I, Part 3, 2 FCC Rcd 3498 (1987) (*NRC Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-207

In re Applications of

LYNN KETELSEN (hereafter: Ketelsen) — File No. BPH-900510MM

CRYSTAL BROADCAST PARTNERS (hereafter: Crystal) — File No. BPH-900510MQ

For Construction Permit
for a New FM Station on Channel
254C1 in Rapid City, South Dakota

HEARING DESIGNATION ORDER

Adopted: June 28, 1991; Released: July 24, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rulemaking.* The grant of either of these applications will be conditioned upon the ultimate outcome of MM Docket 88-540 (petition for reconsideration pending) regarding the allocation for Channel 254C1 in Rapid City, South Dakota.

3. *Ketelsen.* Although Ketelsen's answers to FCC Form 301 (June 1989), Section II, Questions 1 and 6 reveal that the applicant is a sole proprietor and U.S. citizen, she certified in response to Question 11(a) that the application violates 47 U.S.C. § 310 (alien ownership/control). To resolve this apparent ambiguity, we will specify an appropriate issue.

4. *Crystal.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Crystal has filed such statement, it is deficient. Crystal has not listed specific recruitment sources for women. Accordingly, Crystal will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. *Air Hazard Issue.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Ketelsen have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Ketelsen would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Ketelsen's application violates 47 U.S.C. § 310, and, if so, whether Ketelsen is legally qualified to be a licensee.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Ketelsen would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That any grant in this proceeding will be conditioned upon the ultimate outcome of MM Docket 88-540.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Crystal shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-210

In re Applications of:

Robert D. Janecek d/b/a LION'S SHARE BROADCASTING (hereafter "Lion's Share") — File No. BPH-900504MD

GREAT SCOTT BROADCASTING (hereafter "Great Scott") — File No. BPH-900518MM

LOMPOC MINORITY BROADCASTERS PARTNERSHIP (hereafter "LMBP") — File No. BPH-900518MO

John Walton Smith, Jr. d/b/a NOE-WAL BROADCASTING) (hereafter "NOE-WAL") — File No. BPH-900522MH

RADIO LOMPOC LIMITED PARTNERSHIP (hereafter "Radio Lompoc") — File No. BPH-900516MS (Previously Dismissed)

For Construction Permit for a New FM Station on Channel 285A in Lompoc, California

HEARING DESIGNATION ORDER

Adopted: June 28, 1991; Released: July 24, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On October 18, 1990, Radio Lompoc filed a petition for reconsideration requesting reinstatement of its September 18, 1990 application which was returned for a tenderability defect. Specifically, Radio Lompoc failed to include a full scale topographic map as described in Form 301, Instruction V and the Commission's Public Notice entitled "FCC Clarifies Transmitter Site Map Requirements," Mimeo 3693, released April 5, 1985 (51 Fed. Reg. 45,945, December 23, 1986). *See also* Item 4, Appendix D to the *Report and Order*, in MM Docket No. 84-750, 50 Fed. Reg. 19,936, 19,945 (1985). Radio Lompoc's map, a photocopy of a full scale topographic map reduced to a regular size page, was too imprecise to allow us to verify the engineering data.

3. Radio Lompoc's petition requests reinstatement of the original application *nunc pro tunc*. Radio Lompoc simultaneously submitted an amendment to correct the tenderability defect. The petition argues that "[t]he particular deficiency at issue is more analogous to incorrect rather than missing information" and that its site map was incorrect as to form. Radio Lompoc claims that: (1) its coordinates could be verified by the reduced map "in conjunction with other material in Radio Lompoc's application;" (2) any terrain obstructions "could be observed from the reduced scale map;" (3) the nearby communications facilities," [a]lthough the map does not show them, such facilities do exist," and that information is provided elsewhere in the application; and (4) the site elevation could be ascertained from "maps contained in other mutually exclusive applications for the same facility." In the alternative, Radio Lompoc asserts that since the Commission's Appendix D to the *Report and Order, supra*, "obviously failed to articulate the distinction between tenderability and acceptability defects with sufficient precision," the Commission should accept Radio Lompoc's amendment, which was filed within the amendment as of right period. In support, Radio Lompoc states that "[t]he Commission's ability to enforce 'hard look' acceptability criteria is dependent upon such criteria being clearly announced and consistently enforced," citing *Rochelle C. Salzer v. FCC*, 778 F. 2d 869 (D.C. Cir. 1985).

4. In 1985, faced with the influx of thousands of applications for new allotments, the Commission adopted a "hard look" approach to processing applications. To aid in the orderly processing of commercial FM applications, the Commission's rules provide that applications such as Radio Lompoc's must be filed before the close of the specified window filing period. 47 C.F.R. § 73.3564. Applications that are tendered for filing during the window period are forwarded to the Mass Media Bureau, where an examination is made as to whether the applications are "substantially complete." Any applications that are not substantially complete are returned to the applicant as not "tenderable." The applications that are found tenderable are placed on a publicly released "Notice of Tenderability." For a period of 30 days following this public notice, minor amendments may be filed as a matter of right to perfect applications. Following the 30 day amendment period, the applications, and any amendments, are studied for acceptability, which is defined as "compliance with technical requirements for FM facilities." *Report and Order, supra*, at 19,941. Administrative fairness requires that the Commission give full notice to parties whose rights may be affected by our policies. The Commission may require strict compliance where such adequate notice is provided. *See, Rochelle C. Salzer v. FCC*, 778 F. 2d 869,877 (D.C. Cir. 1985). The Commission may modify its processing standards to meet changed circumstances so long as it does so explicitly and with good reason and provides the requisite notice. The Commission has met both requirements here. The purpose of its "hard look" approach, adopted in the *Report and Order, supra*, was "to expedite service to the public and to provide increased certainty and efficiency in the application processing system." *Id.* at 19,936. Previously, any errors in the applications would have remained undetected until considerable processing time and effort had

been expended. In order to prevent carelessly prepared applications from burdening the processing system, we now require applications to be substantially complete at tender or they will be returned. In Appendix D to the *Report and Order*, the Commission carefully defined the critical elements that are essential in determining whether an application is substantially complete. One of the critical elements for a substantially complete application pursuant to Appendix D is a full scale topographic map which allows the engineering staff to verify the coordinates of the proposed site, whether there are other nearby communications facilities or terrain obstructions, and the ground elevation of the transmitter site. The Commission further stated that the absence of such a map "prevents a determination of acceptability and thus renders that application not substantially complete." If however," the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender." *Id.*

5. The Commission's rules require that a petition for reconsideration be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. § 1.106(c) and (d). Without such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd. sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966); *Employment Practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Since there is no newly discovered evidence in this case, the only basis for reversing the earlier finding as to tenderability is a demonstration that the Commission erred in its earlier determination. *See* Appendix D to the *Report and Order, supra.*

6. We have examined Radio Lompoc's petition and have determined that the Commission did not make an error in returning the application as untenderable. Radio Lompoc argues that the engineering data may be verified by using other materials in its application and by using maps contained in other mutually exclusive applications for the same Lompoc facility. However, it was not possible to ascertain the accuracy of Radio Lompoc's coordinates and ground elevation for the transmitter site "confidently and reliably drawing on the application as a whole." Allowing an applicant to amend its application after the 30-day window filing period has passed would undermine the efficient "hard look" processing procedures adopted in the *Report and Order, supra*, to expedite the authorization of new FM service to the public. The Commission realized that "[t]his shift may well result in a loss of filing status for a returned application that. .. otherwise would have [been] retained under the previous processing procedures." *Id.* However, faced with thousands of applications for new allotments, the Commission was compelled to adopt a more stringent process. Radio Lompoc's assertion that the Commission failed to articulate the distinction between tenderability and acceptability is without merit. The *Report and Order, supra*, after outlining the reasoning for the Commission's "hard look" processing, clearly defined in Appendix D, that an application which is sufficient for tender must be substantially complete as to the critical elements listed. Thus, contrary to Radio Lompoc's contention, the Commission clearly has the ability to require strict compliance with its "hard look" procedures. Accordingly, the petition for reconsideration will be denied.

7. *Transmitter Location.* On January 14, 1991, Great Scott filed a petition to deny LMBP's application alleging that the engineering proposal will not provide either city grade service or line-of-sight to Lompoc, as required by 47 C.F.R. § 73.315. LMBP's opposition states that the proposal provides the requisite city grade coverage and that the narrow mountain peaks between the proposed transmitter site and the city of Lompoc do not constitute a "major obstruction" under § 73.315(b). Based on the prediction method prescribed by the Commission's rules, LMBP's proposal would provide the requisite 70 dBu contour coverage of Lompoc. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985).

8. Section 73.315(a) of the rules requires that the transmitter location be chosen so that "a minimum field strength of 70 dBu above one uV/m (dBu), or 3.16 mV/m, will be provided over the entire principal community to be served." Section 73.315(b) states, in pertinent part that "the antenna site should be so chosen that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path." The Commission has allowed minor deviations of line-of-sight, stating that Section 73.315(b) "does not absolutely require line-of-sight over an FM applicant's principal community." *Rush County Broadcasting Co., Inc.*, 20 RR 2d 783 (1970). In *Jesse Willard Shirley*, 24 RR 2d 982 (1972), the Commission held that there was no violation of Section 73.315(b) where the city to be served was covered by the 3.16 mV/m contour despite the fact that several hills obstructed the line-of-sight into the city.

9. The Commission's propagation experts have examined the exhibits filed by Great Scott and LMBP, and have concluded that, while parts of Lompoc are not in the line-of-sight from LMBP's transmitter site and the intervening terrain would have an effect on the signal over the city, the terrain's effect would not be sufficient to render the service unsatisfactory or constitute a major obstruction. Accordingly, Great Scott's petition to deny LMBP's application will be denied.

10. *Technical Qualifications.* Lion's Share and Great Scott have each filed their respective applications using the provisions of 47 C.F.R. § 73.215. However, the staff's review indicates that deficiencies exist in each applicant's contour overlap showing. Lion's Share's application proposes to use the provisions of 47 C.F.R. § 73.215 to protect KOHD(FM), a third-adjacent channel Class A station operating from Guadalupe, California. Section 73.215(e) requires that a spacing of 25 kilometers be maintained between these two facilities. However, the site proposed by Lion's Share is only 22.5 kilometers from KOHD's transmitter site. Therefore, Lion's Share's application is not eligible for processing under 47 C.F.R. § 73.215. On January 14, 1991, Great Scott filed a petition to deny the application of Lion's Share stating that Lion's Share's proposed antenna site was in violation of the minimum spacing requirements of 47 C.F.R. § 73.215. In light of the action taken herein, the petition to deny filed by Great Scott will be granted, but only to the extent indicated.

11. Great Scott's proposal uses the contour overlap method in an attempt to protect short-spaced, first-adjacent channel Class B station KCAQ(FM), Oxnard, Cali-

fornia. Great Scott's engineering data indicates that the protected and interfering contours for KCAQ were determined from its licensed antenna height above average terrain (HAAT), 482 meters, and the effective radiated power (ERP) of 4 kW, adjusted so as to consider KCAQ as a maximum Class B station. However, under 47 C.F.R. § 73.215(b)(2)(ii), this station should have been protected as if it had been operating with 50 kW ERP at the referenced HAAT of 150 meters. By not doing so, Great Scott's application has understated the amount of overlap with KCAQ. Consequently, Great Scott's application is in violation of 47 C.F.R. § 73.215.

12. These defects render Lion's Share's and Great Scott's applications technically unacceptable for filing. However, because we recognize that the wording of § 73.215(b)(ii) does not, for "hard look" processing purposes, afford applicants full and explicit notice of the prerequisites they must meet to avoid summary dismissal, we will not dismiss Lion's Share's and Great Scott's applications for this rule violation. *Compare Rochelle C. Salzer v. FCC*, 778 F. 2d 869, 875 (D.C. Dir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous) *with Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991) (dismissal affirmed where rules are clear). Instead, Lion's Share and Great Scott must file a curative amendment with the presiding Administrative Law Judge pursuant to 47 C.F.R. § 73.3522(b).

13. *Interference.* The staff's study reveals that there is a possibility that Lion's Share's signal, when mixed with the signal of the facilities of permit BPH-880620MB, Orcutt, California, would produce a signal which has the potential to cause receiver-induced intermodulation interference (RITOI) on the frequency of KRQK(FM), Lompoc, California. In addition, when the signal of Lion's Share is mixed with the signal of KRQK(FM), it also has the potential to cause RITOI on the frequency of the Orcutt, California permit. Accordingly, Lion's Share will be required to investigate this matter and submit an amendment specifically accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver-induced or other types of modulation) to facilities in existence or authorized or to radio receivers in use prior to grant of this application.

14. *Air hazard.* Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Great Scott and NOE-WAL would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

15. *RF Radiation.* Each of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that two of the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Lion's Share and NOE-WAL failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Lion's Share and NOE-WAL will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

16. *Cross-interest.* Mr. Richard P. Keating, a general partner of LMBP is also the general manager of station KNEZ(AM) in Lompoc, California. Mr. Keating has indicated his intent to terminate his relationship with KNEZ in the event of grant of the referenced application. This employment may represent a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1988). Accordingly, in the event of grant of LMBP's application, Mr. Keating will be required to sever all connections with station KNEZ prior to the commencement of program test authority.

17. *Other matters.* The Commission requires that if there are five or more full-time station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Lion's Share and NOE-WAL have filed such statements, they are deficient. Both applicants failed to list a hispanic organization. Hispanics make up 17.3% of the labor force. Accordingly, the above named applicants will be required to file amended EEO programs with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

18. NOE-WAL petitioned for leave to amend its application on March 14, 1991. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative

position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

19. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

20. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Great Scott and NOE-WAL would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Lion's Share and NOE-WAL in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Radio Lompoc IS HEREBY DENIED.

23. IT IS FURTHER ORDERED, That the petition to deny filed by Great Scott against LMBP IS HEREBY DENIED.

24. IT IS FURTHER ORDERED, That the petition to deny filed by Great Scott against Lion's Share IS HEREBY GRANTED to the extent indicated.

25. IT IS FURTHER ORDERED, That, in accordance with paragraph 12 hereinabove, Lion's Share and Great Scott shall submit a curative amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That, in accordance with paragraph 13 hereinabove, Lion's Share shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That, in accordance with paragraph 15 hereinabove, Lion's Share and NOE-WAL shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

29. IT IS FURTHER ORDERED, That in the event of grant of LMBP's application, Richard P. Keating will be ordered to sever all connections with station KNEZ(AM), Lompoc, California, prior to commencement of program test authority.

30. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Lion's Share and NOE-WAL shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

31. IT IS FURTHER ORDERED, That the petition for leave to amend filed by NOE-WAL IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

32. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

33. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

34. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FLORIDA 10 RSA LIMITED PARTNERSHIP — File No. 08645-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 369, Florida 10 - Walton RSA, for Station KNKQ296

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 1991; Released: July 24, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Florida 10 RSA Limited Partnership (Florida 10) filed the captioned application to modify its existing wireline cellular system in the Florida 10 - Walton Rural Service Area (RSA). The 39 dBu contour for one of the proposed cells would extend beyond the Florida 10 RSA and into both the adjacent Fort Walton Beach, Florida Metropolitan Statistical Area (Fort Walton MSA) and the Gulf of Mexico (Gulf). Western Florida Cellular Telephone Corporation (Western), the non-wireline licensee for the Fort Walton MSA, has filed a petition to deny. Responsive pleadings were filed. For the reasons stated below, we deny the petition and grant the captioned application.

II. DISCUSSION

2. Western argues that the proposed extension is too large to be considered *de minimis*. Western notes that the extension amounts to 33.9 percent of the total cell area and covers 101.3 square miles, with the extension into the Fort Walton MSA amounting to 19 percent of the cell and covering 56.8 square miles, and the extension into the Gulf of Mexico amounting to 14.9 percent of the cell and covering 44.5 square miles. Western further argues that Florida 10 has not provided the required engineering explanation as to why the extension into the Fort Walton MSA is necessary. Florida 10 responds that the wireline licensee for the Fort Walton MSA has consented to the extension into the MSA, and that the Commission's *de minimis* policies do not apply to consensual extensions. Florida 10 further argues that the extension into the Gulf is *de minimis* and adequately justified.

3. Generally, 39 dBu contour extensions are only allowed when they are *de minimis* and the application includes a specific engineering explanation as to why the extension is necessary. *See Procedures Update*, 52 RR 2d 725 (1982), *aff'd. Cellular Radio Service*, 56 RR 2d 1583 (1984); Sections 22.903(a) and 22.923(c)(1) of the rules. However, an extension into an adjacent MSA will be permitted where the carrier requesting the extension receives permission from the corresponding carrier in the adjacent market and where the CGSA of the licensee in the adjacent market encompasses the extension area.[1] In such cases the *de minimis* requirements regarding size and engineering justification for the proposed extension are irrelevant.[2] The wireline licensee for the Fort Walton Beach MSA has consented to the proposed extension and the extension falls entirely within that carrier's authorized CGSA. Accordingly, we find that the 39 dBu contour extension into the Fort Walton Beach MSA is permissible.[3]

4. We now turn to the non-consensual extension into the Gulf.[4] The Gulf constitutes a separately licensed cellular market, the Gulf of Mexico Service Area (GMSA). However, the Gulf licensees have not opposed the proposed extension. Furthermore, the Gulf extension meets the Commission's *de minimis* standards. The extension is small in size amounting to only 14.9 percent of the total cell area[5] and covering only 44.5 square miles. Furthermore, Florida 10 has explained that it is seeking to provide coverage to several beachfront communities within the RSA and that a directional antenna has been used to minimize the extension into the Gulf. Based on the foregoing considerations, we find that the extension into the Gulf is *de minimis* and adequately justified.

III. ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED THAT the application (File No. 08645-CL-MP-91) of Florida 10 RSA Limited Partnership IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Florida 10 - Walton RSA and is conditioned upon coordinating with the current and future co-channel licensees in the area outside the RSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

6. IT IS FURTHER ORDERED that the petition to deny filed by Western Florida Cellular Telephone Cooperative IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *Northeast Pennsylvannia Cellular Telephone Company*, 4 FCC Rcd 2064, 2065 (Mob. Serv. Div. 1989); *Orange County-Poughkeepsie Limited Partnership*, 3 FCC Rcd 1191 (Mob. Serv. Div. 1988); *Bell Atlantic Mobile Systems of Philadelphia*, 2 FCC Rcd 7531 (Mob. Serv. Div. 1987). *See also Utica Telephone Company*, 5 FCC Rcd 2791 (Mob. Serv. Div. 1990).

[2] *See Orange County*, 3 FCC Rcd at 1191; *Bell Atlantic Mobile Systems*, 2 FCC Rcd at 7531. *See also Utica*, 5 FCC Rcd 2791 (where corresponding carrier consents to extension size of the overlap is solely a matter of agreement between the two licensees). Western argues that the present case is distinguishable because in *Utica* and *Orange County* the extensions were considered necessary to aid in providing continuous service between the cellular markets and to enhance intersystem handoff, while the extension here is far in excess of that necessary to achieve such objectives. However, we note that the extensions in cases such as *Orange County and Bell Atlantic* are comparable to that proposed here, and, furthermore, these cases specifically state that size of the extension is irrelevant when the corresponding carrier consents.

[3] Section 22.923(c)(1) of the rules requires RSA applicants proposing a contour extension to include a "detailed engineering justification demonstrating the necessity for such an extension." This rule was intended to codify existing Commission policy and case law regarding contour extensions and, as stated above, the Commission's *de minimis*; requirements regarding size and engineering justification are not applied in the case of consensual extensions.

[4] Where only a portion of a proposed contour extension is covered by the consent of a corresponding carrier, the remaining portion is considered separately and must meet the Commission's *de minimis* requirements. *See Northeast*, 4 FCC Rcd at 2605.

[5] *See e.g., Houston Cellular Telephone Company*, 5 FCC Rcd 7140 (Mob. Serv. Div. 1990) (19.8 percent extension is *de minimis); Rhys G. Mussman*, 3 FCC Rcd 6808, 6811 (Com. Car. Bur. 1988) (19 percent extension is *de minimis); South Carolina Metronet, Inc.*, 6 FCC Rcd 968 (Mob. Serv. Div. 1991) (16.7 percent cell extension is *de minimis)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-540

In the Matter of

Amendment of Section 73.202(b), RM-6546
Table of Allotments,
FM Broadcast Stations.
(Rapid City, South Dakota)

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1991; Released: July 24, 1991

By the Chief, Mass Media Bureau:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order* ("R&O") in this proceeding, 5 FCC Rcd 1033 (1990), filed by Spitzer Communications Co. ("Spitzer"). The *R&O* substituted Channel 281C1 for Channel 282C at Rapid City, South Dakota, and modified the construction permit of Tom-Tom Communications, Inc. ("Tom-Tom") accordingly, and allotted Channel 254C1 to Rapid City. The Commission also has before it a Petition to Rescind or Revoke the Construction Permit ("petition to rescind") awarded to Tom-Tom in the proceeding for Channel 282C at Rapid City, South Dakota (MM Docket No. 87-420) filed by Spitzer, which will be consolidated with the above petition and considered jointly in this proceeding. Tom-Tom filed an Opposition to the Petition for Reconsideration and an Opposition to the Petition to Rescind or Revoke the Construction Permit.

BACKGROUND

2. Channel 282C was allotted to Rapid City in June, 1985. Tom-Tom, Spitzer, and three other parties filed applications for use of Channel 282C. Spitzer's application was returned as untenderable because it proposed facilities below the minimum for Class C stations as set forth in Section 73.211 of the Rules.[1] Tom-Tom eventually was granted the construction permit for Channel 282C at Rapid City as the result of approval of a joint settlement agreement[2] and a subsequent Summary Decision by an Administrative Law Judge.[3] The Federal Aviation Administration ("FAA") imposed conditions on its approval of the antenna site. In order to avoid the substantial additional expense and risk necessary to satisfy the conditions placed on its construction permit, Tom-Tom subsequently filed a petition for rule making requesting that the channel be downgraded to Channel 281C1. We then issued a *Notice* on the proposal.

3. Spitzer Communications opposed Tom-Tom's proposal. Spitzer argued that if Tom-Tom's proposal was granted, it would perpetuate a fraud upon the Commission and permit Tom-Tom to benefit from misrepresentation or lack of candor, and deny Spitzer its right to a full and fair hearing. Spitzer further argued that if the channel is downgraded, Tom-Tom should lose its construction permit and the channel should be reopened to competing applications. We subsequently downgraded the channel, finding that Tom-Tom had acted at all times in good faith and that it had fully disclosed all relevant information to the Commission concerning its problems with the FAA. We could see no benefit in requiring Tom-Tom to construct a costly broadcast facility when a solution existed which would enable Tom-Tom to expeditiously provide new competitive service to the residents of Rapid City, while also satisfying the FAA's concerns. We also allotted an additional Class C1 Channel to Rapid City since Spitzer expressed an interest in applying for one.

PETITION FOR RECONSIDERATION OF CHANNEL 281C1 AND CHANNEL 254C1

4. Spitzer seeks reconsideration of the *R&O* on two main issues. First, it contends that the Commission erred by allotting Channel 254C1 as an additional channel to Rapid City. In support of this contention, Spitzer raises three arguments. First, it alleges that the allotment of Channel 254C1 violates the Administrative Procedure Act ("APA") and the Commission's Rules since the required opportunity for notice and comment on the channel addition was never provided. Spitzer argues that the *R&O* is the first indication that Spitzer's opposition would be treated as a counterproposal and request for the allotment of an additional channel. Spitzer contends that contrary to Section 553 of the APA and Section 1.415 of the Commission's Rules, interested parties were not afforded notice of the proposed rule making to amend the table of allotments or an opportunity to comment on the allotment of Channel 254C1. Spitzer concludes that the Commission's efforts to mollify Spitzer by adding a new channel to Rapid City so as to avert the confrontation over Tom-Tom's proposed channel downgrade is ineffective and illegal. Spitzer requests that the Commission either (1) deny the downgrade of Channel 282C, or (2) substitute a single C1 channel, in lieu of Channel 282C, without the addition of other C1 or lower class channels, so that other parties, including Spitzer, may compete with Tom-Tom for the construction permit Tom-Tom now holds and seeks to modify.

5. Second, Spitzer argues that the allotment of Channel 254C1 is in error because Spitzer never requested that any other channel be allotted to Rapid City, South Dakota, and never expressed an interest to apply for the channel. Spitzer contends that, contrary to the Commission's mistaken belief, it was not advocating the addition of a further FM allotment to Rapid City. Spitzer states that it was

[1] Spitzer sought reconsideration of the dismissal of its application, which was denied. *See* 5 FCC Rcd 5912 (MM Bur. 1987).
[2] *See* 87M-3164, released December 7, 1987.
[3] *See* 3 FCC Rcd 546 (1988).

opposing Tom-Tom's proposal to remain the permittee of a downgraded frequency, since this would have the effect of depriving Spitzer from competing for the same frequency for which Tom-Tom had applied. Spitzer contends that its proposal was not to add Channel 222C1, 254C1 or 292C2 to Rapid City, but it was proposing that its application be reinstated and modified to specify any channel substituted for Channel 282C.

6. Third, Spitzer claims that the additional channel at Rapid City would not be economically viable, because the community does not have the economic base to sufficiently support any more radio stations, in addition to the allotment of Channel 282C.

7. The other major issue raised by Spitzer's petition is whether the Commission's staff improperly downgraded Channel 282C. In this regard, Spitzer argues that the Commission granted Tom-Tom's downgrade request for Channel 282C notwithstanding the fact that Tom-Tom made no compelling showing as to why the channel should be downgraded or why the downgrade would be in the public interest, citing *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment* ("Downgrade R&O"), 4 FCC Rcd 2413 (1989). Rather, Spitzer states that the sole basis articulated by the Commission for granting Tom-Tom's request to downgrade Channel 282C is that the lower class channel will make things easier and less expensive for Tom-Tom. Spitzer believes that this serves Tom-Tom's private interest but not the public interest. Moreover, Sptizer alleges that Tom-Tom received a comparative preference in the proceeding for Channel 282C because, as the result of Tom-Tom's proposal to construct a full Class C facility, the Commission unilaterially denied Spitzer's request for waiver of the minimum facilities rules and dismissed Spitzer's application. Spitzer contends that under the policy established in the *Downgrade R&O*, Tom-Tom cannot downgrade the channel because it already received a comparative preference for having propsed a Class C station.

8. Tom-Tom filed an opposition to Spitzer's petition. At the outset, Tom-Tom states that it has no objection to the allotment of Channel 254C1 to Rapid City and will not, therefore, respond to Spitzer's arguments concerning the allotment of that new channel. However, Tom-Tom questions Spitzer's arguments concerning the propiety of the Commission having downgraded Channel 282C. Citing the *Downgrade R&O*, Tom-Tom contends that it was not required to make a compelling showing for a downgrade because it did not receive a comparative preference. On the contrary, Tom-Tom states that the case was settled prior to hearing. *See Summary Decision*, 3 FCC Rcd 546 (1988). Tom-Tom further notes that Spitzer's application was dismissed as defective because Spitzer failed to specify the minimum facilties required for the station and did not adequately support its waiver request. Tom-Tom argues that the dismissal of Spitzer's application was correct, citing *Nan E. Carlisle & Jittendra R. Patel*, 64 RR 2d 1437, (1988) and *Teton Broadcasting Ltd. Partnership*, 61 RR 2d 1288, (1986). Tom-Tom also argues that the dismissal of Spitzer's application has long since become final, and its belated appeal is grossly out of time.

DISCUSSION

9. After carefully considering the arguments raised by the parties, we believe that Spitzer's petition for reconsideration should be denied. As explained below, we believe that it was proper to allot Channel 254C1 as an additional Class C1 channel to Rapid City and to downgrade Channel 282C by substituting it with Channel 281C1.

10. We will first address the issue of notice. We believe that there has been sufficient notice and opportunity for comment pursuant to the Administrative Procedure Act to allot Channel 254C1 to Rapid City. This is because, once we have issued a Notice of Proposed Rule Making proposing a change in the FM Table of Allotments, our policy is to allot as many channels as possible to accommodate competing expressions of interest. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982); *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, 98 FCC 2d 916 (1984), *recon. denied*, 59 RR 2d 1466 (1986); and *Helena, Montana*, 50 RR 2d 70 (1982). For example, in *Helena*, we allotted a total of four Class C channels to accommodate competing expressions of interest -- two of these C channels were used for upgrading existing Class A stations and the other two channels were made available for application by other interested parties. In this case, we interpreted Spitzer's comments as being an expression of interest. In its counterproposal to the *Notice* in this proceeding Spitzer proposed that "the Commission reinstate the Spitzer application and allow Spitzer to modify the application to specify operations on Channel 281C1 or one of the other channels which would permit the construction of C1 facilities at Rapid City, South Dakota." In light of these comments and Spitzer's attempts to remain in this proceeding, we believe that it was reasonable for the staff to reach the conclusion that Spitzer was interested in serving the community of Rapid City. However, even if we misconstrued Spitzer's comments as an expression of interest, it would serve no useful purpose to delete the channel when there are two applications pending. Our view is further buttressed because there is no harm to the public. No other party expressed an interest in using the newly allotted channel elsewhere or indicated that our action in alloting the channel precluded an upgrade or a new allotment somewhere else.

11. Further, Spitzer's arguments regarding the economic consequences of allotting Channel 254C1 to Rapid City are without merit. This is due to the fact that the Commission no longer considers such economic arguments in FM and TV allotment proceedings. *See Policies Regarding Detrimental Effects of New Broadcast Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989).

12. Next, we believe that the basis of Tom-Tom's request for the downgrade and our resolution was proper. Here, Tom-Tom stated that its request for substitution was a pragmatic attempt to take a course of least resistence to resolve the FAA issue so that it could start providing service to the public in the most expeditious and cost-effective manner possible. In justifying the substitution of Channel 281C1 for Channel 282C, the Commission found that while no party had submitted evidence that it would be impossible to construct a station on Channel 282C, evidence was presented that it would be costly and difficult to construct the facility. The Commission concluded that in light of the FAA's increasing concerns with interference between broadcast and air navigation, the Commission saw no benefit to require Tom-Tom to construct

the costlier higher class channel facility when Tom-Tom's lower class proposal would enable it to expediously provide a new service to Rapid City.[4] Spitzer has not shown that we erred in making that decision.

13. We also disagree with Spitzer's argument that Tom-Tom was required to make a compelling showing as to why the channel should be downgraded. In the *Downgrade R&O, supra,* the Commission stated that "a proponent of a downgrade who makes the request before or during the first year of station operation and who was the prevailing petitioner in a contested allotment proceeding as a direct result of the class of channel proposed will be expected to make a compelling showing that the downgrade would serve the public interest." However, this policy only applies where the party benefitted in a comparative allotment proceeding by having proposed a higher class channel which it now seeks to downgrade. Here the allotment at Rapid City was uncontested. Only one party requested the allotment of Channel 282C to Rapid City, and no other parties, including Spitzer, filed counterproposals that were mutually exclusive with this allotment. Consequently, the allotment of Channel 282C at Rapid City was not made on a comparative basis with any other proposals. *See Report and Order,* 50 FR 24643, June 12, 1985. Likewise, the grant of Tom-Tom's construction permit was not the result of a comparative hearing in which Tom-Tom was awarded a comparative preference. Rather, as correctly noted by Tom-Tom, the case was settled prior to hearing. The Administrative Law Judge in a Summary Decision found that Tom-Tom was the only remaining applicant and was qualified to construct and operate as proposed.

14. *Petition to Rescind or Revoke Tom-Tom's Construction Permit.* In this related pleading, Spitzer contends that Tom-Tom's construction permit for Channel 282C at Rapid City should be revoked based upon lack of candor in MM Docket No. 87-420, the proceeding in which Tom-Tom obtained its construction permit. Specifically, Spitzer argues that its request for waiver of the minimum facilities rule and the dismissal of its application in that docketed proceeding were based on the fact that other applicants had proposed sites which would accommodate a Class C station. Spitzer believes that Tom-Tom's rule making proposal to downgrade Channel 282C is evidence that critical information concerning the feasibility of building a Class C FM station and obtaining FAA approval was concealed. We do not agree. As the Chief, Allocations Branch concluded in the *Report and Order* in MM Docket No. 88-540:

> ... based on the record before us, we find that Tom-Tom fully disclosed all relevant information to the Commission concerning its problems with the Federal Aviation Administration. Indeed, Tom-Tom sought Commission assistance in arriving at a solution amenable to all parties concerned. Moreover, when the history of Tom-Tom's actions are viewed in light of the FAA's increasing concerns during the same period of time with interference between broadcast and air navigation facilities, our conclusion that Tom-Tom has acted at all times in good faith is strengthened.[5]

Spitzer has not submitted any probative evidence of intentional deception in its petition to rescind which contradicts this finding or which would raise a substantial and material question of fact necessitating a hearing on the lack of candor question. Therefore, we will deny Spitzer's petition to rescind or revoke Tom-Tom's construction permit.

15. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED That the Petition to Rescind or Revoke the Construction Permit filed by Spitzer Communications, Co. IS DENIED.

16. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Spitzer Communications, Co. in MM Docket No. 88-540 IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[4] Indeed, in the *Downgrade R&O* the Commission also noted that downgrading may be desirable where, *inter alia,* an existing station is unable to meet FAA requirements.
[5] 5 FCC Rcd at 1035.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In re Applications of

Eunice Wilder and Sheridan Broadcasting Corp. d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC.	File No. BPH-851216OA
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV
WITJO BROADCASTING, INC.	File No. BPH-851216OX
PENNY DRUCKER	File No. BPH-851216QB
VIRGINIA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-851216QE

For Construction Permit for
New FM Station, Channel 266A,
Richmond, Virginia

ORDER

Adopted: July 15, 1991; **Released: July 24, 1991**

By the Commission:

1. In this proceeding, Administrative Law Judge Joseph Chachkin granted a motion for summary decision resolving in favor of James River Communications Corporation (James River) financial and related reporting issues on which the case had been remanded by the Review Board, and granted James River's application. 5 FCC Rcd 3812 (ALJ 1990). The Review Board affirmed the ALJ's action. 6 FCC Rcd 1262 (Rev. Bd. 1991).

2. Now before the Commission are: (1) an Application for Review filed March 28, 1991 by Barbara B. Benns; (2) an Application for Review filed March 29, 1991 by WKIE-FM, Inc.; (3) a Contingent Application for Review filed March 29, 1991 by James River; (4) an Application for Review filed March 29, 1991 by Weyburn Broadcasting Limited Partnership; (5) an Application for Review filed April 1, 1991 by Future Broadcast Limited Partnership; (6) an Application for Review filed April 1, 1991 by Virginia Commonwealth Limited Partnership; (7) an Application for Review filed April 1, 1991 by Witjo Broadcasting, Inc.; (8) a Consolidated Opposition to Applications for Review filed April 10, 1991 by James River; (9) an Opposition to Contingent Application for Review filed April 15, 1991 by Benns; and (10) a Consolidated Response to Applications for Review filed April 15, 1991 by Weyburn.[1]

3. After a thorough review of the matters before us, we agree with the Board's resolution of this case.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the applications for review filed March 28, 1991 by Barbara B. Benns, March 29, 1991 by WKIE-FM, Inc. and Weyburn Broadcasting Limited Partnership, and April 1, 1991 by Future Broadcast Limited Partnership, Virginia Commonwealth Limited Partnership and Witjo Broadcasting, Inc. ARE DENIED and the Contingent Application for Review filed March 29, 1991 by James River Communications Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Penny Drucker did not appeal the Review Board's decision and therefore the Board's denial of her application is final.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OPERATOR SERVICES PROVIDERS
OF AMERICA

Petition for Expedited Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1991; Released: July 11, 1991

By the Commission:

1. In this order, we grant to the extent indicated below a petition filed by the Operator Services Providers of America (OSPA) requesting that the Commission declare invalid, insofar as it applies to interstate and foreign communications, a Tennessee statute imposing certain requirements on operator service providers (OSPs) offering service in Tennessee. [1]

BACKGROUND

2. On March 19, 1990, the State of Tennessee enacted a statute setting forth certain requirements governing the provision of intrastate *and* interstate operator-assisted service. In relevant part, the Tennessee statute requires that, before providing service, any OSP offering *interstate* service in Tennessee whose rates exceed the highest legal rate "approved" by the FCC for a dominant carrier for handling an interstate operator-assisted call: (1) shall identify by name the carrier providing the service; (2) shall state all costs for providing the service; and (3) shall offer to transfer the customer to any other carrier offering operator-assisted services and inform the customer that the transfer will be made without charge. [2] The statute defines "approved" to include the highest "legal" rate charged by a carrier classified as dominant. The Tennessee statute provides that it applies to calls that originate in Tennessee and are billed to an address 3 located within the state. The statute provides that any carrier violating the statute shall be guilty of violating, and shall be punished in accordance with, the Tennessee Consumer Protection Act.

3. On October 17, 1990, the federal Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) became law. [3] TOCSIA directed the FCC to conduct a general rulemaking to establish rules protecting consumers from unfair and deceptive practices and ensuring that consumers have the opportunity to be fully informed in using operator services to place interstate calls. It establishes, and directs the Commission to implement, a broad range of requirements concerning call blocking, potential rate regulation, the use of access codes by interexchange carriers, presubscription compensation, fraud against call aggregators and technological capability of equipment used by call aggregators to permit consumers to access interstate OSPs by use of equal access codes. For present purposes, the most pertinent provisions of TOCSIA are those that require each provider of operator services at a minimum: (1) to identify itself before the consumer incurs any charge; (2) to permit the consumer then to terminate the call at no charge; (3) to disclose all charges upon request; and (4) not to engage in "call splashing,"[4] except that the caller may be transferred to another OSP at the request of the customer, provided that the consumer is informed prior to the transfer that the rates for the call may not reflect rates from the actual originating location of the call, and that the consumer then consents to the transfer. In April 1991, the Commission promulgated regulations implementing TOCSIA. [5] TOCSIA and its implementing rules apply only to interstate operator services.

4. In a petition for declaratory ruling filed before enactment of TOCSIA, OSPA contends initially that the Tennessee statute is invalid, insofar as it applies to interstate communications, because the Commission has exclusive jurisdiction over interstate communications. Alternatively, assuming concurrent federal and state jurisdiction over the subject matter of the Tennessee statute, OSPA contends that application of the Tennesse statute to interstate service is invalid because the Commission has fully occupied the field sought to be addressed in the Tennessee statute, leaving no room for state regulation in the area. OSPA also contends that the statute is invalid because it requires OSPs in some instances to engage in call splashing in violation of the Common Carrier Bureau's *TRAC Order*. [6]

DISCUSSION

5. In order to resolve the request for declaratory ruling, we address in turn the following issues: (1) whether the Tennessee statute applies to interstate communications, (2) whether the Tennessee statute as applied to interstate

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[1] Comments and/or reply comments in support of the petition were filed by the Competitive Telecommunications Association, Integretel, Inc., Intellicall, Nycom Information Services, the Operator Assistance Network, U.S. Long Distance, Telesphere Limited, Inc., International Operators, Inc., and International Telecharge, Inc. Comments and/or reply comments in opposition were filed by the Tennessee Public Service Commission, the Maryland People's Counsel, and the Missouri Public Service Commission.

[2] Public Chapter No. 675 amending Title 65, Chapter 5, Part 2 and Section 47-18-104 of the Tennessee Code Annotated. The Tennessee statute is attached as an *Appendix*.

[3] Pub. L. No. 101-435 (Oct. 17, 1990), *amended*, Pub. L. No. 101-555 (Nov. 15, 1990) codified at 47 U.S.C. Section 226. The OSPA petition appeared on Public Notice on October 31, 1990. Comments and reply comments were submitted on November 28, 1990, and December 14, 1990, respectively.

[4] "Call splashing" refers to the transfer of a call from one OSP to another that results in a charge to the consumer for the call that is not based on the actual originating location of the call, *i.e.*, where the caller is located. See 47 U.S.C. Section 225(a)(3).

[5] *Policies and Rules Concerning Operator Service Providers*, CC Docket 90-313, FCC 91-116, released April 15, 1991.

[6] *Telecommunications Research Action Center*, 4 FCC Rcd 2157 (Com. Car. Bur. 1989), *app. for review pending*.

communications is displaced by, or conflicts with, the Communications Act and TOCSIA, and (3) whether the Commission has authority to grant the OSPA petition. We then address several other issues raised by the Tennessee PSC. The request for declaratory ruling does not call upon us to preempt, and we do not address, application of the Tennessee statute to intrastate communications.

6. *Application of the Tennessee Statute to Interstate Communications.* The Tennessee statute clearly applies to interstate operator services. [7] By its own terms, the statute applies to all calls that originate in Tennessee and are billed to an address located in the state. There is no exemption for interstate calls satisfying those criteria. On the contrary, the statute provides that its requirements are triggered by certain OSP "interstate" rate levels. In addition, the legislative history of the Tennessee statute makes clear that it applies to both intrastate and interstate calls. [8] Finally, Tennessee has not denied in this proceeding that its statute applies to interstate communications. Accordingly, we conclude that the Tennessee statute applies to interstate communications, in this case interstate operator services. [9]

7. *Displacement By, or Conflicts With, the Communications Act and TOCSIA.* Outside the sphere of Section 2(b)(1) of the Communications Act, which generally reserves to the states jurisdiction over intrastate communications, whether a state may impose requirements on interstate communications depends on an analysis under the Supremacy Clause of Article VI of the U.S. Constitution. State action is prohibited if "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively," or the state action actually conflicts with federal law.[10] We here conclude that the Communications Act and TOCSIA independently establish Congress' intent to have this Commission exclusively regulate the rates, terms, and conditions of interstate operator services, the subject matter of the Tennessee statute, and that the Tennessee statute's application to interstate operator services actually conflicts with a federal statute and implementing regulations.

8. OSPA avers that the Communications Act grants this Commission exclusive jurisdiction over interstate and foreign communications. The Tennessee PSC, on the other hand, contends that the Commission does not have exclusive jurisdiction over interstate operator services because states have authority to protect consumers against unfair, deceptive, and fraudulent practices of interstate carriers offering service in a state under Section 414 of the Communications Act.[11]

9. Under the Supremacy Clause, state action may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.[12] State requirements in such cases are invalid even if the state laws are not inconsistent with federal law.[13] The key inquiry is whether Congress intended to supplant state laws on the same subject. Congress' intent to supersede state law need not be explicit, but may be inferred from the nature of the federal statutory regime.[14]

10. We turn first to the Communications Act, which grants to the Commission jurisdiction over "all interstate and foreign communication by wire or radio,"[15] while generally reserving to the states jurisdiction over "intrastate communications by wire or radio of any carrier." [16] Under this regulatory framework, the Commission has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is entrusted to the Commission.[17] The Commission's jurisdiction over interstate and foreign communications is ex-

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[7] Section 3(e) of the Communications Act, 47 U.S.C. Section 153(e), defines interstate communications as encompassing communication or transmission from any state, territory or possession of the United States or the District of Columbia to any other state, territory, possession of the United States or the District of Columbia.

[8] Remarks of Rep. Matt Kisber, House of Representatives, March 7, 1990 (HB 2322).

[9] Missouri contends that OSPA should be required to make a factual showing as to how many, if any, of the calls that originate in, and are billed to an address, in Tennessee are interstate calls. Whether we should grant the OSPA petition depends, in our view, on the applicability of the Tennessee statute to interstate communications, not on the extent to which interstate calls are occurring. Accordingly, we may address the request for declaratory ruling without any factual showing on this point. In any event, Tennessee has submitted extensive factual information indicating that interstate calls are occurring. See "AOS Pricing Survey" submitted with the Tennessee PSC's Reply Comments.

[10] *English v. General Electric Co.*, 58 USLW 4679, 4681 (1990).

[11] Citing *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976); *English v. General Electric Company*, 58 USLW 4679 (1990); *Long Distance Telecommunications Litigation*, 831 F. 2d 627 (6th Cir. 1987); *Kellerman v. MCI Telecommunications*, 493 N.E. 2d 1045 (Ill. 1986); *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (D.C. Cir. 1984); 47 U.S.C. Section 414.

[12] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986); *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *See also NY State Commission on Cable T.V. v. FCC*, 669 F. 2d 58, 66 (2d Cir. 1982); *Schneidewing v. ANR Pipe Line Co.*, 485 U.S. 293 (1988).

[13] See cases cited at note 12, *supra*; *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

[14] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698 (1984); *Fidelity Federal Savings and Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

[15] 47 U.S.C. Section 152(a).

[16] 47 U.S.C. Section 152(b)(1). Even under Section 2(b)(1), this Commission may preempt state regulation of intrastate communications when state decisions regarding intrastate communications would negate, thwart, or impede the exercise of lawful federal authority over interstate communications. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 (1986); *Public Utility Commission of Texas v. FCC*, 886 F. 2d 1325, 1331 (D.C. Cir. 1989); *California v. FCC*, 905 F. 2d 1217 (9th Cir. 1990). As noted, however, the petition before us does not raise a question of federal preemption of state regulatory authority over *intra* state communications, but a state's attempt to assert authority over *interstate* communications.

[17] Interstate and foreign communications are "totally entrusted to the FCC." *National Ass'n of Regulatory Util. Com'rs v. FCC*, 746 F. 2d 1492, 1501 (D.C. Cir. 1984). The Commission has "plenary and comprehensive regulatory jurisdiction over interstate and foreign communications," *Telerent Leasing Corp. et al.*, 45 FCC 2d 204, 217 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). "Congress vested in [the FCC] plenary jurisdiction to regulate the instrumentalities and facilities used in the transmission and reception of interstate communications." *Orth-O-Vision, Inc. Petition for Declaratory*, 69 FCC 2d 657, 666 (1978).

clusive of state authority,[18] Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state.[19]

11. Section 414 of the Act does not alter the grant of plenary authority to the Commission over interstate communications. Section 414 of the Act[20] preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation -- remedies generally applicable to all corporations operating in the state, not just telecommunications carriers. [21] Only Section 2(b)(1) of the Act limits the authority of the Commission, and that section reserves to the state authority over intrastate communications, not interstate communications. Similarly, the cases cited by the Tennessee PSC do not alter the Commission's exclusive jurisdiction over the rates, terms, and conditions of interstate communications.[22]

12. We conclude that the Communications Act precludes the Tennessee statute's efforts to regulate interstate and foreign communications. The Tennessee statute seeks broadly to establish the terms and conditions under which interstate operator services may be offered in the states -- establishing specific requirements for OSPs before they complete interstate calls. The Tennessee statute thus seeks to exercise one of the fundamental functions exclusively assigned to this Commission under the Communications Act, namely to assure the reasonableness of the rates, terms, and conditions, of interstate communications services.[23] The Tennessee statute does not concern remedies against interstate carriers based on statutory or common law remedies preserved under Section 414, such as a consumer's ability to sue OSPs for common law fraud or misrepresentation and, therefore, is not within the scope of Section 414. Accordingly, we find that the Communications Act precludes application of the Tennessee statute to interstate operator services.

13. Several commentors argue that, apart from the Communications Act, TOCSIA now clearly occupies the field of interstate operator services regulation to the exclusion of state regulation. [24] The Tennessee PSC and state commenters have not specifically addressed this contention. However, the Tennessee PSC has contended generally that its statute may lawfully coexist with federal requirements because there is no conflict between state and federal requirements.

14. TOCSIA and its legislative history make clear that Congress viewed TOCSIA as establishing a "regulatory framework" for the interstate operator services industry,[25] and as filling a need for comprehensive solutions that it believed the Commission's previous proceedings had failed to provide.[26] As indicated, to implement this framework, the statute establishes a broad range of requirements governing the industry, in addition to the specific matters addressed by Tennessee, and directs the Commission to conduct a "general" rulemaking to establish rules that will protect consumers from unfair and deceptive practices in their use of operator services to place interstate telephone calls.[27] Thus, it is apparent that Congress intended to, and did, create a comprehensive legislative solution to any problems in the interstate OSP industry -- a federal solution that precludes a potpourri of differing state requirements applicable to interstate services.[28] Ac-

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[18] "[T]he States do not have jurisdiction over interstate communications," *AT&T and the Associated Bell System Cos. Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service in Common Control Switching Arrangements (CCSA)*, 56 FCC 2d 14, 20 (1975), *aff'd, California v. FCC*, 567 F. 2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978)." [T]he effect of the [Communications Act] is to bring all interstate communications under [its] coverage to the exclusion of local statutes or decisions." *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp 92, 93 (E. D. Tenn. 1940). "It is beyond dispute that interstate communications is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC." *AT&T Communications v. Public Service Comm'n*, 625 F. Supp 1204, 1208 (D. Wyo. 1985)

[19] Where Congress has given this Commission exclusive authority over interstate and foreign communications, we need not demonstrate that "state regulation of interstate communications would impose some burden upon interstate commerce or would frustrate some particular policy goal of the Congress or of this Commission in order to preclude a state commission from regulating the rates for an interstate communications service." *Chesapeake and Potomac Telephone Company of Maryland*, 2 FCC Rcd 3528 (1987). See also *State Corp. Com'n of Kan. v. FCC*, 787 F. 2d 1421 (10th Cir. 1986).

[20] Section 414 provides that the Communications Act shall not "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 47 U.S.C. Section 414.

[21] *See Kellerman v. MCI*, 493 N.E. 2d 1045 (Ill. 1986).

[22] In *Kellerman v. MCI*, 493 N.E. 2d 1045 (Ill. 1986), for instance, the court permitted recovery under state fraud statutes against an interstate carrier, finding that the state cause of action was not preempted in view of Section 414. The court observed that the state remedies involved in that case did not touch upon matters the Congress intended in the Communications Act to leave to the Commission such as "the reasonableness and lawfulness of rates." 493 N.E. 2d at 1051.

[23] Tennessee has claimed that its statute does not set rates because OSPs may charge any rate provided the disclosure requirements are met. Tennessee Reply Comments at 4. It is true that the Tennessee statute's requirements apply only to OSPs whose rates exceed the rates of AT&T -- the dominant interstate long-distance carrier. Yet the effect of this regulatory approach is that either the rates of an interstate OSP offering service in Tennessee are capped at the AT&T level, or, the OSP is subject to the specific terms and conditions of the statute, including those not involving rate disclosure, such as the requirement that an OSP offer to transfer the call to another OSP. In either event, the statute impermissably encroaches upon this Commission's exclusive jurisidiction to regulate the rates, terms, and conditions of interstate communications common carriage.

[24] OSPA avers as well that the Commission's decisions concerning billing and collection have "occupied the field" leaving no room for state regulation. In view of our determinations that the Communications Act precludes Tennessee's attempt to regulate interstate communications, and that TOCSIA more specifically has comprehensively regulated the field of interstate operator services, we do not find it necessary to decide whether the Commission's billing and collection decisions would independently preclude application of the Tennessee statute to interstate operator services.

[25] H. Rep 213, 101st Cong., 1st Sess. (1990), p. 16.

[26] S. Rep. No. 435, 101st Cong., 1st Sess. (1990), p. 5.

[27] 47 U.S.C. Section 225(d).

[28] In the area of posting of rate information by call aggregators, TOCSIA explicitly permits state regulation. 47 U.S.C. Sections

cordingly, under the regulatory framework established by Congress in TOCSIA, the Tennessee statute may not apply to interstate operator services.

15. Finally, some commenters in support of the petition contend that the Tennessee statute directly conflicts with TOCSIA in that the Tennessee statute seeks to regulate rates of interstate operator services. [29] The Tennessee PSC argues that the Tennessee statute and federal requirements are compatible in that they follow the same general approach to addressing problems in the OSP industry.

16. Apart from congressional intent in the Communications Act and TOSCIA for federal requirements to displace state requirements applicable to interstate operator services, the Tennessee statute may not apply to interstate operator services because state law applicable to an area of interstate commerce must give way to the extent that it actually conflicts with federal law."[30] "Such a conflict arises when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31] We believe that the Tennessee statute stands as an obstacle to the achievement of federal objectives in several ways. First, in establishing requirements in the areas of call branding, call splashing and rate disclosure different from those in TOCSIA, the Tennessee statute undercuts the goal of TOCSIA of educating consumers to enable them to make fully informed choices when using OSPs. Differing federal and state requirements applicable to interstate operator services as consumers travel around the country making long distance calls are more likely to confuse, than to educate consumers. Second, the Tennessee requirements in these areas, by virtue of being more burdensome than federal requirements, make impossible achieving the balance established by Congress between the degree of regulation and reliance on marketplace forces for interstate OSPs. Third, the Tennessee statute, as indicated, is a scheme of regulation based on rates. While requiring informational tariffs, TOCSIA specifically declines to require rate regulation, preferring instead to the extent feasible that a competitive marketplace and a fully informed consumer, with the opportunity to make choices, curb market dysfunctions in the operator service industry.[32] The type of rate-based scheme of regulation embodied in the Tennessee statute that ties requirements to rates would sufficiently constrain the pricing decisions of interstate OSPs to undermine the determination of TOCSIA that the interstate OSP marketplace, at least for the time being, be permitted to operate free of rate regulation. Because the Tennessee statute conflicts with federal objectives in these ways, it may not govern the offering of interstate operator services in Tennessee.[33]

17. *Authority to Grant the OSPA Petition.* The Tennessee PSC contends that the Commission does not have authority to grant the OSPA petition because only a court has the authority to invalidate a state statute on constitutional grounds. OSPA contends that it is not requesting the Commission to address the constitutionality of the Tennessee statute. Rather, according to OSPA, it is requesting a ruling on the validity of the Tennessee statute only insofar as it interferes with the Commission's statutory authority to regulate interstate communications.

18. In this order, we have interpreted our jurisdiction under the Act, ascertained congressional intent in our statutory mandate, and assessed the interstate operator services and its compatibility with federal requirements governing the same area. In many previous cases, the Commission has performed similar functions, and preempted decisions of state regulatory commissions."[34] In our view, the Commission's authority to declare paramount federal authority over interstate communications is not affected by whether the subject of a petition for declaratory ruling is a state statute or some other type of state action. Moreover, the Commission has adopted rules that preempt state statutes as well as local regulations,[35] and Commission rules can supersede provisions in a state constitution insofar as they intrude on areas within the Commission's authority.[36] There can be no serious doubt that we have the authority to grant the OSPA petition to the extent indicated herein.

225(c)(2). The fact that TOCSIA specifically permitted state action in this area supports the view that the Congress intended in other areas to preclude state authority.

[29] OSPA also contends that the Tennessee statute is unlawful because it conflicts with the requirements concerning call splashing of the *TRAC Order*. We believe that the requirements concerning call splashing of the *TRAC Order* have been superseded by those of TOCSIA. Accordingly, we do not discuss this allegation further. In paragraph 15, *infra*, we discuss conflicts between the requirements concerning call splashing of TOCSIA and the Tennessee statute.

[30] *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. at 368, citing *Hines v. Davidowitz*, 312 U.S. at 52.

[31] *City of New York v. FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings and Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982).

[32] 47 U.S.C. Section 225(h).

[33] The Tennessee PSC has claimed that there is no conflict between state and federal requirements because of a "savings" clause in the Tennessee Consumer Protection Act, T.C.A. 47-18-111, of which the Tenessee operator services statute is a part, that exempts acts or transactions required or specifically authorized under other Tennessee laws or federal laws. The Tennessee PSC contends that if an OSP can show that its alleged deceptive practices are required or specifically authorized by federal law any prosecution under the Tennessee statute would be dismissed. Comments of the Tennessee PSC at 11. The Tennessee savings clause does not preclude conflicts between state and federal statutes. On its face, the savings clause permits application to interstate OSPs of additional, supplementary, or different statutory requirements that are not required or specifically authorized under federal laws. The Tennessee PSC appears to contemplate, and has not denied, that its operator services requirements would continue to be applicable to interstate OSPs offering service in Tennessee regardless of the savings clause. Thus, this provision does not prevent the Tennessee statute from standing as an obstacle to achievement of federal objectives.

[34] *See, e.g., Atlantic Richfield Company*, 3 FCC Rcd 3089 (1988), *aff'd Public Utility Commission of Texas v. FCC*, 886 F. 2d 1325 (D.C. Cir. 1989).

[35] *Norlight*, 1 FCC Rcd 132, *recon. denied*, 2 FCC Rcd 5167 (1987); *Preemption of Local Zoning or Other Regulation of Receive Only Earth Stations*, 59 R. R. 2d 1073 (1986),*recon. denied*, 1 FCC Rcd 202 (1987); 47 C.F.R. Section 25.104; *Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 FCC 2d 952 (1985).

[36] *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984).

19. *Other Issues.* The Tennessee PSC contends that the Commission should not address the OSPA petition because it raises only legal issues that are more appropriately addressed by judicial authorities, because there is no case or controversy in that enforcement of the statute has not begun, and because the issues do not require or involve agency expertise. It has also requested an evidentiary hearing.

20. In view of the actual and potential conflicts between the federal and state requirements, and the need for uniformity in regulations applicable to interstate operator services, we believe that the public interest will best be served by resolving these issues now. Further, we believe that it is fully appropriate to address issues concerning the Commission's jurisdiction, which are within the expertise of this agency. While the record does not establish that the Tennessee PSC has begun enforcement actions, we see no reason, in the absence of a legally binding commitment not to enforce the statute against interstate OSPs, to wait until enforcement actions have begun.[37] Business planning decisions, including market entry or exit, network design and capabilities, and contracting with customers are all likely to be affected by the threat of future enforcement. And the Tennessee statute says on its face that it "shall take effect upon becoming law," requiring no implementing regulatory actions. Finally, no party has identified a factual issue relating to the OSPA petition that would lead us to excercise our discretion to order an evidentiary hearing.

CONCLUSION

21. In this order, we have found that the Communications Act and TOCSIA preclude application of the Tennessee statute to interstate operator services because those statutes have established a comprehensive scheme of federal regulation over interstate operator services and because application of the Tennessee statute to such services would stand as an obstacle to achievement of federal objectives. Accordingly, we declare that OSPs are not required to comply with the Tennessee statute to the extent Tennessee authorities seek to apply it to interstate operator services.

22. In reaching this conclusion, we emphasize that we share with state authorities the broad goals of protecting consumers who use operator services from unfair and unreasonable rates and practices. As determined by Congress, however, the authority to pursue these goals for interstate operator services resides with this Commission and not with state authorities. Of course, we here only reassert federal authority over interstate operator services. We do not address intrastate operator services, which are subject to regulation by state authorities.

23. Accordingly, IT IS ORDERED, That the "Petition for Expedited Declaratory Ruling" filed by the Operator Service Providers of America IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Section 1. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following language as a new section to be appropriately designated:

Section ___.

(a) Any telephone carrier offering or providing operator-assisted services in Tennessee whose intrastate rates exceed the maximum rate approved by the Tennessee Public Service Commission (TPSC) or whose interstate rates exceed the maximum rates approved by the Federal Communications Commission (FCC) shall before providing the service:

(1) identify, by name the carrier providing the service;

(2) state all costs for providing the service; and

(3) offer to switch customer to any other carrier offering operator-assisted services and inform the customer that the switch will be made without charge.

(b) As used in this section:

(1) "Operator-assisted services" means all telephone calls in which the customer is assisted by either a human or mechanical operator and include, but are not limited to, calls billed to credit cards or third parties and all collect or person-to-person calls.

(2) "Maximum rate approved by the Tennessee Public Service Commission (TPSC)" means the highest legal rate charged for handling an identical call by a carrier whose rates have been fixed by the TPSC based on the carrier's cost of providing service.

(3) "Maximum rate approved by the Federal Communications Commission (FCC)" means the highest legal rate charged for handling an identical call by a carrier which has been classified by the FCC as a dominant, interstate carrier or if no carrier has been so classified, means the highest rate approved by the FCC as just and reasonable for an identical call.

(c) The TPSC may exempt any carrier from some or all of the provisions of this section upon a finding that the requirements herein are no longer necessary to protect the public interest.

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[37] *North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).The OSPA petition alleged that initial enforcement steps had already begun or were imminent.

(d) Any telephone carrier violating the provisions of this act shall be guilty of violating the Tennessee Consumer Protection Act of 1977 and shall be punished accordingly.

Section 2. Tennessee Code Annotated, Section 47-18-104(b), is amended by adding the following as a new subdivision to be appropriately designated:

( ) Violations of the provisions of this act.

Section 3. The provisions of this act shall apply only to calls which originate in the State of Tennessee and which are billed to an address located within the State of Tennessee.

Section 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

Section 5. This act shall take effect upon becoming law, the public welfare requiring it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	**CC Docket No. 80-286**
Establishment of a Program to Monitor the Impact of Joint Board Decisions	**CC Docket No. 87-339**

REQUEST FOR COMMENTS

Adopted: July 12, 1991; Released: July 25, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In 1987, the Federal/State Joint Board in CC Docket No. 80-286 recommended a program to monitor the impact of certain Commission decisions.[1] The Commission adopted those recommendations and established a monitoring program.[2] This program established a series of monitoring reports to publish information in eight categories: (1) subscribership and penetration levels; (2) lifeline assistance plans; (3) costs and high cost assistance; (4) network usage and growth; (5) rates and revenues; (6) bypass; (7) pooling and rate deaveraging; and (8) jurisdictional shifts in revenue requirements.[3] All of the information underlying and contained in the Monitoring Reports have not revealed any harmful effects of the Commission decisions adopted pursuant to the Joint Board recommendations.

2. The Monitoring Reports have proven to be valuable in more ways than merely reporting the effects of regulatory changes. The Monitoring Reports bring together in one place a wealth of information on our national telecommunications system, including valuable classifications by state and by company. Much of this information is unavailable from other sources and the information has been widely used by federal and state regulators and legislators, as well as by the industry, the press, academics, and the general public. The information is useful in evaluating the current state of the industry as well as the potential impact of future changes in the industry.

3. The monitoring program is currently scheduled to expire in 1992. Because the reports have proven to be so useful, we propose to continue them. The purpose of this request for comments is to seek comment on extending this program in a modified form. We are seeking comment on whether the program should be extended and, if so, on the length of the extension and the frequency, timing, format, and content of future reports. As a basis for discussion, we outline below our tentative proposal for the continuation of the program. In brief, we propose to continue to release two reports per year, to introduce two new sections containing financial and infrastructure data, and to eliminate the bypass section. At this time we suggest an extension of the monitoring program for an additional five years, until 1997. We propose to continue the monitoring program in this open docket in which comments and materials may be submitted at any time. As has been the case, the details of the program may change over time, to the extent that suggested changes in the program are determined to be in the public interest.[4]

II. FREQUENCY, TIMING AND FORMAT

4. When the monitoring program began in 1987, the reports were issued quarterly in March, June, September, and December of each year. In March 1989 the Joint Board recommended that the frequency and timing be changed to semi-annual reports issued in January and July.[5] This recommendation was adopted by the Commission[6] and made effective with the summer 1989 report, which was released in July.

5. We propose to continue to release two reports per year, in January and July. Because some of the information in the reports is only submitted annually, we expect that some of the sections may be omitted from one of the two reports if no new information is submitted during the six months since the prior report.

6. Since their inception, the Monitoring Reports have been released in paper (hard copy) format. With the increasing volume of data and the use of computers to process the data, there has been an increasing demand to make the statistical information in the report available in computer readable format. Much of the information is now available in this way, and we encourage the availability of as much information as possible in such computer format. However, we believe that it is important to also continue publishing the reports in paper format.

III. CONTENT

7. The only substantive change in the content of the monitoring report since its inception was the elimination of the section on jurisdictional shifts in revenue requirements.[7] The last report of information in that section was in the July 1990 report. Of the remaining sections, we propose to delete the section on bypass after 1992.

8. A brief discussion of each of the sections that we propose to include in the Monitoring Reports after 1992 follows. This includes the introduction of two new sections into the reports, and the modification of some of the other existing sections.

A. Subscribership and Penetration Levels

9. This section currently reports estimates of the number and percentage of households with telephone service, based on the Current Population Survey conducted by the Bureau of the Census. We propose to continue including this information in our reports. We also propose to include comparable information from the 1990 decennial census when it becomes available, because that information is based on a substantially larger sample, which will enable greater reliability and detail of information.

B. Lifeline Assistance Plans

10. This section reports information on the Federal lifeline and Link-Up America programs. Originally, the information in this section was based on Form 496, which was required to be filed by the entity (state or company) which had a certified program. Effective in 1991, however, this form has been eliminated,[8] and replaced with information supplied by the National Exchange Carrier Association (NECA), which administers the payments in the lifeline and Link-Up America programs. We propose to continue publishing the information provided by NECA on the participation in and costs of these programs. In addition, we will continue to publish information provided by state agencies and telephone companies. We encourage those agencies and companies to continue to provide such information.

C. High Cost Assistance

11. The third section of the Monitoring Report is currently titled "Costs and High Cost Assistance". This section reports information supplied by NECA on non-traffic sensitive costs and high cost assistance in its administration of the Universal Service Fund. We propose to continue publishing this information. Because our proposed new section on revenue, expenses, and investment will contain information on total costs, we propose to simplify the title of this section.

D. Network Usage and Growth

12. This section reports information supplied by NECA on access minutes, messages, dial equipment minutes (DEM), subscriber line usage (SLU) minutes, loops, DEM factors, SLU factors, and subscriber plant factors (SPF). Because the SLU factor is little used, and because it is similar to the DEM factor, which is regarded as being more reliably measured, we propose to eliminate the reports on SLU factors and minutes. As the transition of the SPF to a flat 25 percent allocator is completed for most study areas in 1993, we propose to eliminate the SPF reports for those study areas and just report the SPF for the remaining study areas whose transition period was extended due to the SPF's high initial value. We propose to retain all of the other information in this section.

E. Rates

13. The fifth section of the Monitoring Report is currently titled "Rates and Revenues", but it only contains rate information. We thus propose to simplify its title. It currently reports price index information supplied by the Bureau of Labor Statistics, as well as information on rates and rate cases supplied by the telephone companies. We propose to retain this information. In addition, we propose to expand the information on interexchange carrier rates to include those of MCI and Sprint, as well as the AT&T rates currently reported. We also propose to move the comparison of carrier common line access charges from the section on Pooling and Rate Deaveraging to this section.

F. Revenues, Expenses and Investment

14. To fill the gap of a lack of revenue, expense and investment information in the reports, we propose to add a new section to the reports. We propose to include in this section data from the Automated Reporting Management Information System (ARMIS) summarizing information on revenues, expenses and investment by jurisdiction, by state, and by company. Reporting this information by jurisdiction will allow us to monitor any jurisdictional shifts which may occur. The data that we propose to include in this section are net revenues, expenses and taxes (broken down into plant specific, plant non-specific, customer operations, corporate operations, depreciation and amortization, other expenses, federal income taxes, and other taxes), other operating income or losses, non-operating items, net income after operating expenses and taxes, plant in service (broken down into central office equipment, cable and wire facilities, and other plant) other investments, reserves (broken down into accumulated depreciation/amortization and other), and net investment. For each of these, we propose to report the total company amount, the non-regulated amount, the amount subject to separations, the state amount, the interstate amount, and the percent interstate. This information will be on a study area basis for all Tier 1 carriers.

G. Pooling

15. The seventh section of the Monitoring Report is currently titled "Pooling and Rate Deaveraging". We propose to transfer the information related to rates to the section on rates and to simplify the title of this section. Also included in this section is information supplied by NECA related to the administration of its common line and traffic sensitive pools. This section also reports the amounts of transitional and long-term support payments for those companies which have withdrawn from the NECA common line pool. With the termination of the transition period, there will no longer be any transitional support to report. We propose to retain the information on the administration of the NECA pools, as well as the information on long-term support payments to the NECA common line pool.

H. Infrastructure and New Services

16. We propose to add a new section to the Monitoring Reports to monitor new and experimental services and the placement of new technologies in the telecommunications infrastructure. Because the telecommunications industry is experiencing rapid technological change, we believe it is important to keep abreast of these changes as they occur. This information will allow regulators, legislators, and the industry to make international, interstate and interregional (such as urban versus rural) comparisons on the deployment of new technologies. It may also be valuable to regulators in setting depreciation rates and measuring the success of incentive regulation plans. In its program of monitoring local exchange carrier price caps, the Commission has developed reporting forms for infrastructure monitoring.[9] We propose to publish information gathered from those forms in this section of the report. This includes information on switching equipment, transmission facilities, LEC call set-up time, access lines and book costs. In addition, we propose to issue an open-ended request for states and companies to submit whatever information they have about new or experimental services or infrastructures. This information would be summarized in the Monitoring Reports.

IV. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R §§ 0.91 and 0.291 that COMMENT IS INVITED in this proceding.

18. IT IS FURTHER ORDERED, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, that comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **September 5, 1991,** and reply comments shall be filed with the Secretary on or before **September 26, 1991.** To file formally in this proceeding, participants must file an original and four copies of all comments and reply comments.

19. IT IS FURTHER ORDERED, pursuant to Section 1.51 (e) of the Commission's Rules, 47 C.F.R § 1.51(e), that parties filing comments shall also serve the persons listed in Appendix A to this order with one copy of their filing. Parties should also file one copy of any comments with this Commission's copy contractor, Downtown Copy Center, 1919 M Street N.W., Room 246. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference Room, 1919 M Street N.W., Room 239.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX A

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FOOTNOTES

[1] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 3298 (1987).

[2] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987).

[3] As noted below in para. 7, the monitoring of jurisdictional shifts in revenue requirements has been discontinued.

[4] We propose that the Common Carrier Bureau continue to be directed to prepare the information requests and reports required for this program.

[5] MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72, 80-286, and 87-339, FCC 89J-3, Second Study and Report, released March 24, 1989.

[6] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 4 FCC Rcd 5480 (1989).

[7] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 5 FCC Rcd 1979 (1990).

[8] Public Notice, January 17, 1991, Mimeo No.11380.

[9] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, DA 91-619, released May 17, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-66

In re Applications of:

BEACH BROADCASTING LIMITED PARTNERSHIP — File No. BPH-870730ML

MANUEL LIMA — File No. BPH-870730MP

For Construction Permit for
New FM Station, Channel 233A,
Long Beach, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 1991; Released: July 25, 1991

By the Commission:

1. The Review Board found that neither of the two remaining applicants in this case, Beach Broadcasting and Manuel Lima, is to be preferred over the other for diversification and that both deserve 100% quantitative integration credit.[1] Affirming the ALJ's decision, it held that Beach Broadcasting is comparatively superior to Manuel Lima, however, by virtue of a clear advantage in duration of local residence and slightly superior civic participation which, taken together, outweighed a preference to Lima for greater broadcast experience. *Beach Broadcasting Ltd. Partnership*, 5 FCC Rcd 3201 (ALJ 1990), 6 FCC Rcd 885 (Rev. Bd. 1991). Lima contends in an application for review that Beach's preference for local residence and civic participation is undeserved and therefore that Lima should prevail on the basis of its preference for broadcast experience.[2] We will uphold the grant to Beach.

DISCUSSION

2. We concur in the holding that Beach is entitled to a dispositive preference based on its showing on the local residence enhancement factor. Beach's sole general partner, Stanley Daniels, has lived in the proposed service area since 1953, except for a nine-month period in 1971-72, whereas Lima has lived there since 1970. Although, in view of the fact that both principals have lived in the area for a long time, we think that the difference in duration of local residence is less important than the Board indicated,[3] it is nevertheless a marginal plus in Beach's favor. Of the civic activities documented by these applicants as occurring or beginning before they filed their applications, those of Daniels are more numerous and pertain to a wider range of community concerns. Our assessment of the credit due to each in comparison with the other is not significantly affected by either's showing of post-filing or undated activities. The Board has previously and correctly held that civic activities occurring after the filing of an application are of lesser significance, see, *e.g.*, *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6440-41 ¶¶ 18-19 (Rev. Bd. 1989), rev. denied 5 FCC Rcd 3712 (1990), and activities that occurred at an unspecified time must be similarly discounted. Beach's overall preference on the local residence enhancement factor outweighs Lima's preference for broadcast experience, which is of minor significance. Broadcast experience has always been deemed of less importance than other enhancing factors under the integration criterion, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), and Lima's superiority with respect to this factor is not marked, as Daniels also has considerable broadcast experience. 5 FCC Rcd at 3202 ¶ 19.

3. Moreover, Beach's superiority in the comparative assessment is also supported by a marginal advantage for more efficient coverage. According to undisputed findings, Beach would provide primary coverage to an area 612 square miles larger than Lima would cover and would serve 29,968 more persons, all of whom presently receive primary broadcast service from at least five radio stations. 5 FCC Rcd at 3203 ¶¶ 45-46. The ALJ held that the population differential is too small to justify awarding a comparative coverage preference, noting that in *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 699 (Rev. Bd. 1984) and *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962-63 (Rev. Bd. 1978), rev. denied, FCC 79-451 (rel. 7-15-79), population differentials of 32,570 and 12,000, respectively, in well-served areas were deemed insignificant. *Id.* at 3204 ¶¶ 52-53. Beach challenged that ruling in contingent exceptions, but the Board declined to review the ruling because it concluded that Beach was comparatively superior on other grounds.[4] 6 FCC Rcd at 888 n.6.

4. As Beach correctly maintains, the ALJ erred in concentrating solely on the raw number of the population differential without considering the differential as a percentage. Expressed in the latter way, the differential is 22 percent; Beach's population coverage would be 22 percent larger than Lima's. A difference of this dimension has a bearing on the public interest, as precedent confirms. Preferences were awarded for a similar or lesser superiority in population coverage in well-served areas in *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 ¶ 11 (1989) (preference awarded for 26 percent differential); *Cotton Broadcasting Co.*, 104 FCC 2d 473, 477 (Rev. Bd. 1986), modified, 4 FCC Rcd 1781 (1989) (7.5 percent differential); *Barton Broadcasting Co.*, 104 FCC 2d 785, 790-91 (Rev. Bd. 1986) (26.6 percent differential); *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983), rev. denied, FCC 83-559 (1983) (34 percent differential); and *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647 (Rev. Bd. 1973), rev. denied, 45 FCC 2d 390 (1974), aff'd 511 F.2d 448 (D.C. Cir. 1975) (21 percent differential). *Metro* and *Barnes*, *supra*, on which the ALJ relied, are not dispositive, as the percentages of difference (2 percent and 5 percent) in those cases were far less than here.

5. Lima contended, however, in reply to Beach's contingent exception in this regard, that, even if the difference in predicted coverage is of significant dimension, Beach deserves no comparative coverage preference because the applicants' technical proposals are subject to change. Lima asserted that the channel at issue is a Class A channel and pointed out that the Commission amended its rules as of October 2, 1989 to increase the maximum effective radiated power (ERP) for Class A FM stations from 3 kW to 6 kW. *Amendment of Part 73 of the Rules to*

provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A FM stations, 4 FCC Rcd 6375 (1989). It therefore argued that it would be unreasonable to grant a preference on the assumption that the technical proposals as originally tendered under the old rules will remain unchanged. This argument ignores the fact that the Commission did not authorize a blanket increase for all Class A stations but instead decided to authorize increases in power to 6000 watts only for Class A licensees whose upgrade proposals are consistent with new and more stringent separation requirements or who show good cause for waiving those requirements. *Id.* at 6381 ¶ 46; 47 C.F.R. §73.213(c)(2). Lima does not allege, let alone show, that it could operate with higher power consistently with the new separation requirements, nor does it allege that it would apply for permission to increase power if we were to grant its instant application or that the difference in predicted population coverage between its proposed facility and Beach's, which is entirely attributable to differences in specified antenna height and site location, would be eliminated or substantially reduced if both were proposing operation with 6000 rather than 3000 watts. We will base our assessment on the proposals before us rather than on unsupported speculation about possible upgrading.

6. *Lima's petition to enlarge issues*: On April 12, 1991 Lima filed a motion to add hearing issues against Beach. The motion refers to the fact that Beach filed an amendment on December 27, 1990 reporting that its general partner, Stanley Daniels, had entered into agreements to buy out the ownership interests of two limited partners who together hold a 50 percent share of Beach. Lima maintains that addition of a Section 1.65 issue is warranted because Beach has not filed copies of the agreements -- which, according to Lima, the application form requires it to do -- and because Beach admits in its opposition to Lima's application for review that its prior report that one of the agreements was contingent upon Beach's receiving a permit was incorrect. This request for a reporting issue is baseless, as Lima does not allege, and there is no evident reason to conclude, that copies of the agreements contain any material information that Beach has not already disclosed or that Beach had any improper motive for initially representing that one of the agreements was contingent. Lima's bare assertion that the application form requires submission of the agreements is mistaken, moreover. The application form that these applicants used does not require the submission of partnership agreements, in the first place, and thus does not require the submission of agreements that modify partnership agreements.

7. Lima also urges the Commission to add an issue going to Beach's legal qualifications. It contends that Beach's current application cannot be granted because the amendment discloses that Beach has no intention of holding the construction permit, as it will cease to exist when its general partner buys out the two limited partners, thereby creating a new partnership with a separate legal identity. There is no merit in this contention, either, because the change in question has no decisional significance. The Board rejected essentially the same argument in its decision, 6 FCC Rcd at 887 n.3, citing *Anax*, and Lima does not demonstrate any flaw in the Board's reasoning in this regard, either in its application for review (in which it addresses the same point) or in its petition to enlarge issues.

8. Finally, Lima asks for the addition of a financial issue. It asserts that the buy-out agreement between Daniels and two of his three limited partners affects Beach's financial position in two ways: first, it releases those limited partners from any further obligation to contribute cash to the firm for the construction and operation of the proposed station; second, it imposes on Daniels the added obligation of purchasing their 50 percent interest. Lima contends that a financial issue is warranted in light of these considerations and in light of the fact that Beach has said nothing about the financial impact of the agreement.

9. The request for a financial issue is somewhat dilatory, but inasmuch as the issue goes to Beach's basic qualifications the lack of diligence is not so egregious as to justify dismissal. We will deny the request, however, because Lima bases it on speculation unsupported by specific allegations raising a substantial and material question of fact. In view of the foregoing analysis, it is clear that the public interest will be best served by a grant of Beach's application.

10. ACCORDINGLY, IT IS ORDERED that the application for review filed March 15, 1991 and the motion to enlarge issues filed April 12, 1991 by Manuel Lima ARE DENIED and that Lima's strike motion filed April 12, 1991 IS DISMISSED as moot.

11. IT IS FURTHER ORDERED that the petition for leave to amend filed April 25, 1991 by Beach Broadcasting Limited Partnership IS GRANTED and the attached amendment IS ACCEPTED; that the decision of the Review Board, 6 FCC Rcd 885 (1991) IS MODIFIED as indicated herein; and that the application of Beach Broadcasting Limited Partnership for a construction permit for a new FM broadcast station (File No. BPH-870730ML) serving Long Beach, Mississippi IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Both applicants also received credit for 100 percent minority ownership and for auxiliary power proposals. 5 FCC Rcd 3201, 3204 ¶¶ 50-51 (ALJ 1990).

[2] Lima filed the application for review on March 15, 1991, and Beach filed an opposition on April 1. Lima filed a motion to strike the opposition on April 12, and Beach filed an opposition to the strike motion on April 25.

[3] *Cf. Colonial Communications, Inc.*, 6 FCC Rcd _____, _____ ¶ 10 (1991), *Linda Crook*, 3 FCC Rcd 354 ¶ 4 (Rev. Bd. 1988), and *Jarad Broadcasting*, 1 FCC Rcd 181, 187 (Rev. Bd. 1986), rev. den., 2 FCC Rcd 6080 (1987).

[4] Beach asserts in a footnote in its opposition to the application for review that it deserves a slight coverage preference. Lima argues in a motion to strike that Beach has no right to dispute any aspect of the lower decisions because it declined to file an application for review. Beach replies that it is not foreclosed for that reason from taking issue with the lower decisions because, it argues, § 1.115(a) did not permit it to file an application for review. As we have decided to review the coverage issue

as raised before the Board on our own motion, the question presented by the strike motion -- *viz.*, whether Beach had the right to preserve its exceptions to the holding below concerning comparative coverage by referring to them in its opposition -- is irrelevant. Because Lima responded to Beach's argument in this regard in reply to Beach's contingent exceptions, and as we have that response before us in the record, we see no need to call for briefs on this point.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-541

In re Applications of

JOSEPH BAHR	File No. BPH-871028MB
GUILLERMO A. BONET	File No. BPH-871029MH
RENACER BROADCASTERS CORPORATION	File No. BPH-871029MK
OCCIDENTAL BROADCASTING CORPORATION	File No. BPH-871029MM

For Construction Permit for a
New FM Station on Channel 291A
in Hormigueros, Puerto Rico

Appearances

James L. Oyster, Esq., on behalf of Joseph Bahr; *William P. Bernton, Esq.*, on behalf of Guillermo A. Bonet; *Stuart B. Mitchell, Esq.* and *Diane Ming, Esq.*, on behalf of Renacer Broadcasters Corporation; *John L. Tierney, Esq.*, on behalf of Occidental Broadcasting Corporation and *Paulette Laden, Esq.*, on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: July 16, 1991; Released: July 25, 1991

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Occidental Broadcasting Corporation ("Occidental"), Joseph Bahr ("Bahr"), Guillermo A. Bonet ("Bonet") and Renacer Broadcasters Corporation ("RBC") for a new FM broadcast station to operate on Channel 291A at Hormigueros, Puerto Rico. These applications were designated for hearing by a *Hearing Designation Order* ("HDO") of the Chief, Audio Services Division, DA 89-1473, released December 20, 1989, on the following issues:

a) To determine whether there is a reasonable possibility that the tower height and location proposed by Bahr would constitute a hazard to air navigation.

b) To determine which of the proposals would, on a comparative basis, best serve the public interest.

c) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The *HDO* stated that the areas and populations to be served by the parties would be considered under the standard comparative issue. The applicant parties have stipulated that there are no decisionally significant differences among their proposals with respect to comparative coverage.

3. On Ausust 8, 1990 Bahr's Motion For Partial Summary Decision relating to the air hazard issue designated against him was granted. *Order*, FCC 90M-2431. The issue was resolved in Bahr's favor.

II. FINDINGS OF FACT

Joseph Bahr

4. Joseph Bahr, an individual applicant, was born and raised in Puerto Rico. He claims credit as a Hispanic male. Bahr's mother, whose maiden name is Braun, was born in Cuba. (Tr. 28). Her parents were Hungarian (Tr. 28-29). Bahr's father was born in Austria, and Bahr believes his father's parents were also born in Austria (Tr. 29). Bahr presently resides in Rio Piedras, Puerto Rico. Prior to that residence, Mr. Bahr resided in St. Croix, U.S. Virgin Islands, from 1973 to September 1989 (Bahr Ex. 1; Tr. 42-43).

5. Mr. Bahr attended high school in Pennsylvania, and InterAmerican University in Hato Rey (1967-1970) and Bayamon, (1969-1971) Puerto Rico. He holds a BA degree in psychology and sociology. He is also a graduate of the Radio Engineering Institute, Sarasota, Florida.

6. During the period from 1966 to 1972 Mr. Bahr worked full-time and part-time as an announcer and transmitter operator at various radio broadcast stations located in San Juan and Bayamon, Puerto Rico.

7. Mr. Bahr is the sole owner of V.I. Stereo Communications Corp., the licensee of FM broadcast station WVIS, Christiansted, St. Croix, United States Virgin Islands. He applied for that station in 1971 and it went on the air in 1973. For the past 17 years he has been the owner, operator and manager of that station. At the time of the hearing, WVIS had been off the air since September 16, 1989 due to the occurence of Hurricane Hugo. (Bahr Ex. No. 1, pp. 1, 3 Tr. 42-43).

8. Also at the time of the hearing, Bahr had pending a petition for Rule Making to change the community of license of WVIS from Christiansted to Vieques, an island off the east coast of Puerto Rico. Mr. Bahr has told the Commission in the Rule Making proceeding that if relocation of WVIS to Vieques is authorized, he will operate the station at its new location.

9. Mr. Bahr testified that if he is the successful applicant in this proceeding, he will divest his interest in Station WVIS, move his residence to Hormigueros and devote full-time to his position as the general manager of the proposed FM station. (Bahr Ex. No. 1, p. 1).

10. Bahr proposes to install auxiliary power generators at the transmitter and studio locations. (Bahr Ex. 1).

Guillermo A. Bonet

11. Guillermo A. Bonet, an individual applicant, has lived at Mayaguez, Puerto Rico, within the 3.16 mv/m contour of the proposed station, all of his life except for one year when he lived in Arecibo, approximately 6.5 miles away. He will move to, and become a full time resident of, Hormigueros if his application is granted. (Bonet Ex. 1).

12. Bonet was born in Mayaguez on November 14, 1942. He attended primary and secondary schools there. He also attended the University of Puerto Rico at Mayaguez where, in 1975, he received the degree of Bachelor of Science in Electrical Engineering. (Bonet Ex. 1).

13. While at the University of Puerto Rico, Mr. Bonet worked part-time in a technical capacity at various local broadcast stations. (Bonet Ex.1).

14. Following his graduation, he was employed as an engineer, chief operator, contract engineer and consultant at a number of stations throughout the island of Puerto Rico.

15. Approximately nine years ago, Mr. Bonet incorporated under the name of Westcom Corp., which he owns along with his wife, and which also employs his son-in-law. (Bonet Ex. 1).

16. At the present time, he performs part of his engineering services through Westcom Corp. He is also the director of engineering at six radio stations in Puerto Rico. (Bonet Ex. 1; Tr. 61-62). If he obtains the permit, his son-in-law will take over Westcom and Mr. Bonet will devote himself full-time (i.e. 40 hours a week or more) as general manager of the proposed radio station. He will discontinue any employment or other engagement that would conflict with his full-time management of the station. (Bonet Ex. 1).

17. As sole owner and general manager, Mr. Bonet will be responsible for establishing, developing and administering the station's policies as well as for all aspects of its day-to-day operations. He will be solely responsible for hiring and firing all of the station's employees, will make all programming and business decisions, and be his own chief engineer. (Bonet Ex. 1).

18. Mr. Bonet is a member of the Colegio de Ingenieros y Agrimensores of Puerto Rico (Engineers and Surveyors). He has served as President of Mayaguez District's local chapter and produced and hosted for the organization a number of public service programs, broadcast over WORA-TV, Mayaguez. He is currently the delegate of the local chapter of the parent organization, and last spring was elected vice president of the parent. (Bonet Ex. 1). Bonet does not rely upon any civic activity for enhancement of his integration pledge (Tr. 50).

19. Mr. Bonet is Hispanic. (Bonet Ex. 1).

20. Mr. Bonet plans to have auxiliary power available at both his studio and transmitter facilities. (Bonet Ex. 1).

Renacer Broadcasters Corporation

21. Renacer Broadcasters Corporation ("RBC") is a Puerto Rico non-profit, no stock corporation organized, among other things, to acquire and operate broadcast stations. Its officers and directors, are as follows:

Larry Ramos - President - Director

Santa Morales - Secretary/Treasurer - Director

Olga del Carril - Director

22. Neither RBC nor any of its directors or officers owns any interest in any print or broadcast media. RBC proposes to utilize auxiliary power at both its studio and transmitter sites to ensure continued operations in the event of a power failure. (RBC Ex. No. 1; Tr. 99).

23. Larry Ramos is a Hispanic male who will work full time as General Manager of the proposed station. As such, he will supervise the station's day-to-day operations, including all business, operational and programming activities. He will also be responsible for implementing the station's Equal Employment Opportunity Program.

24. Mr. Ramos is a native of Puerto Rico and has lived in Lajas, Puerto Rico, which is located in RBC's proposed service area, all his life. In the event RBC's application is granted, he will relocate to Hormigueros. (RBC Ex. No. 2, p. 1).

25. From 1969 - 1971, Mr. Ramos attended the InterAmerican University, majoring in political science. Between 1972 and 1976, he worked for a construction company where he was responsible for payroll and work schedules. He has worked for a pharmaceutical company since 1976, where he is currently an assistant supervisor. In the event RBC's application is granted, he will discontinue his employment and any other activities which might conflict with his commitment to work full-time at RBC's proposed station. (RBC Ex. No. 2, pp. 1-2).

26. Mr. Ramos is currently Director of Instituto Teologico Asamblea Iglesias Cristianas, a theological school in Puerto Rico. As director, he broadcasts the school's orientation programs over various Puerto Rico broadcast stations. He has also appeared as a guest on a one hour, weekly program called "La Voz Evangelicia", broadcast by Radio Redentor, Inc., licensee of Station WERR, Utuado, Station WRRE, Laba and Station WFAB, Juncos, Puerto Rico. (RBC Ex. No. 2; p. 2)

27. Mr. Ramos' previous broadcast experience includes the following:

1966-71	WRSJ (AM), San German, PR	Weekly Music Program
1968-72	WKFE (AM), Yauco, PR	Music Program
1984-89	WERR (FM), Utuado, PR	Weekly Program Producer/ On-Air Personality
1986-present	WPPC (AM), Penuelas, PR	Weekly Program Producer/On-Air Personality
1986	WRFE (FM), Aguado, PR	Weekly Program Producer/On-Air Personality
1987	WECN (TV), Naranjito, PR	Graduation Program, Theological Institute Producer
1988	Radio Vision, New York, NY	On-Air Personality

1987-89	WIDA (AM), Carolina, PR	Remote Engineer
1981-90	WSOL (AM), San German, PR	Weekly Program On-Air Announcer

(RBC Ex. No.2, p. 1)

28. Ramos has been involved in the following civic activites:

1985-86	Beautification Commission for Lajas
1983-present	Youth cadet coordinator (Lajas). Organized scouting troop and various activities.
1983-86	Promoter, educational films and concerts (Juan Diaz, PR).
1987-present	Anti-drug speaker for Mision Rescate (Lajas; Mayaguez).
1984-86	Men's Association counsellor (Lajas).
1980-present	Volunteer church pastor (Lajas).
1978-present	Visitation of sick (Southern Puerto Rico, including Hormigueros, Lajas and Mayaguez).
1984-present	Juvenile hall counsellor (Lajas).
1985-present	Drug rehabilitation counsellor and Fundraiser for Nueva Vida (Caguas, PR).
1987-present	United Fund--recruiter/fundraiser (San German, PR).
1989	Fundraiser for Hugo Hurriane victims (Lajas).

29. Mr. Larry Ramos selected the communications attorney for RBC, selected its engineer, selected RBC's transmitter site and contacted the site owner (Tr. 97 - 98).

30. RBC's application was prepared by its attorney under the direction of Larry Ramos. Larry Ramos was the only director of RBC who had any contact with that attorney prior to the time the RBC application was filed. Larry Ramos was the only member of RBC to review its application before it was filed (Tr. 101-102, 110-113).

31. Olga del Carril is a Hispanic female who will work full-time as the Program Director at RBC's proposed station. As such, she will formulate and implement the station's programming policies. She will have direct supervision over employees in the Programming Department. (RBC Ex. No. 3, 1).

32. Ms. Carril was born in Puerto Rico on August 15, 1914. She lived in Mayaguez, Puerto Rico, within RBC's proposed service area, for the first 28 years of her life, and then she lived in the United States. She returned to Puerto Rico in 1970. She lived in Levittown, Puerto Rico, between 1970 and 1978, and in Mayaguez between 1983 and 1985. She has lived in Hormigueros since August, 1985. (RBC Ex. No. 3, p. 1; Tr. 243)

33. She received her elementary education in Puerto Rico and high school education in New York. She studied nursing, psychiatry and keypunch in the United States and worked as a practical nurse while she was in New York. (RBC Ex. No. 3, p. 1).

34. Ms. Carril worked for many years as an on-air personality at various places as follows:

1939 -- WPRA (AM), Mayaguez, P.R.

1940 -- Dominican Republic (Voz de la Romana)

1953 -- WEVD, N.Y.

1955 -- New York

1959 -- Mexico City

1975 -- Spain, Romania

1989 -- WCRP (FM), Guayama, P.R.

WECN (TV), Naranjito, P.R.

(Renacer Ex. 3).

35. In 1953, M. Carril worked as a reporter for "Alba de New York," and "La Voz de la Artista." She worked in a theater in Coba (1954), Cleveland, Ohio (1956), and Venezuela (1956). During the 1960's, she played in various television roles in Mexico, and appeared in two motion pictures, "The Strange Woman" and "Unrestful". (Renacer Ex. 3).

36. Ms. Carril participated in anti-drug campaigns sponsored by Mision Rescate (Mayaguez) in 1988 and 1989. Since 1976, she has counselled individuals in Mayaguez, Hormigueros, and other places in Puerto Rico regarding family and personal problems. Since 1976, she has volunteered as a literacy teacher in Hormigueros, and has been a committee member of the Community Park Association (Hormigueros) since 1987. As a member of Mensageras de Senor (Hormigueros), she has been involved in collecting food, clothing and money for the poor since 1986. She is also a member of Escuadron de Cristo Vilne, which is involved in an anti-drug campaign and clothes collection for the poor.

37. Santa Morales Toro, a Hispanic female, is Secretary/Treasurer of RBC. She proposes to work fulltime as Comptroller/Financial Manager at the station. She will formulate and implement the station's financial policies, and will directly supervise any employees working in the Financial Department. (Renacer Ex. 4).

38. She is a native of Puerto Rico. She lived in Lajas, Puerto Rico, which is located in RBC's proposed service area, all her life except for the nine years she lived in New York. In the event the application is granted, she will relocate to Hormigueros. (Renacer Ex. 4).

39. Toro has been involved in the following civic activities:

1984	Youth counsellor (Lajas and other areas in Puerto Rico). Sponsored various activites such as retreats, camping trips, conferences and seminars.
1988	Juvenile hall counsellor (Mayaguez). Sponsored seminars and other activities.
1988	Drug rehabilitation counsellor, Mision Rescate. (Lajas; Mayaguez).
Twice A Year	Drug rehabilitation fundraising (Lajas).
1983	Secretary, Ladies Association (Lajas).
1984-present	Secretary, Theological Institute.
1985-present	President, Parents and Teachers Association (Lajas). Responsibilities include assisting with building school library; acquiring water fountains for school; acquiring 2 acres of land for school; and various fundraisers for school.
1983	Treasurer, Parents and Teachers Association (Lajas).
1984	Secretary, Parents and Teachers Association (Lajas).
1985	Fundraisers for uniforms and flags for scouting organization (Lajas).
1977-present	Volunteer Teacher, Church, Theological Institute (Lajas).
1988-present	Volunteer Secretary, Church (Lajas).
1988	Regional Secretary PTA (Representative to Mayor) (Lajas; Mayaguez).
1989	Fundraiser for Hugo Hurricane victims (Lajas).

(Renacer Ex. 4).

Occidental Broadcasting Corporation

40. Occidental is a Puerto Rico corporation whose officers, directors and shareholders, all of whom are United States citizens and Hispanic, are as follows:

Name	Office Held	Ownership Interest
Susan Baez Dixon	President/Chairman of the Board	22.22% Voting Shareholder
Fernando Luis Sumaza LaBorde	Executive Vice President/Director	11.11% Voting Shareholder
Diana Santos Tristani	Secretary/Director	22.22% Voting Shareholder
Luis Roberto Santos	Sub-Secretary/ Director	11.11% Voting Shareholder
Marta Lopez Negron	Treasurer/Director	22.22% Voting Shareholder
Juan Antonio Somoza	Sub-Treasurer/ Director	11.11% Voting Shareholder

41. Occidental was incorporated on October 1, 1987. Paragraph 3 (1) of its Articles of Incorporation states as follows:

> 3. Purpose and existence: This corporation will have perpetual existence and will do business for pecuniary profit. The nature of the business or purpose to be conducted or promoted are:
>
> (1) To manufacture, contruct, own, use, buy sell, lease, hire and deal in and with articles and property of all kinds, provided however that the CORPORATTION will not acquire or possess, control, directly of [sic] indirectly, land in excess of 500 acres; and/ or radio and/ or television stations.

At about the time of the filing of the Articles of Incorporation, the Occidental stockholders became aware of certain typographical errors contained in them (Tr. 505-506). One of these errors was contained in subparagraph (1) of the above-quoted paragraph 3. Subparagraph (1) contained a prohibition against the corporation owning land in Puerto Rico in excess of 500 acres. Following this prohibition, and after a semi-colon, the phrase "and/or radio and/or television stations" was typed. Recognizing that the phrase "and/or radio and/or television stations" was incomplete and misplaced in the Articles, on October 16, 1987, Occidental's principals made some effort to remove the apparent prohibition against ownership of "radio and/or television stations." On that date, a document described as "Amended Certificate of Incorporation of Occidental Broadcasting Corporation" was prepared (Occidental Ex. 7). That amendment inserted the phrase "including radio and or television stations" in the intended position in the clause, making explicit the purpose of the corporation to own and operate such facilities.

42. Although it was intended that this amendment be filed with the Department of State of Puerto Rico, and a letter to that effect was prepared, the amendment apparently was not received in that office. The principals of Occidental were not aware of this development until presented with a January 23, 1990 certified copy of the Articles at hearing by counsel for Renacer.

43. Susan Baez Dixon, a Hispanic female, resides in Mayaguez, Puerto Rico, where she will continue to reside in the event Occidental is the successful applicant in this proceeding. For the past twenty-five years, approximately, she has lived in Mayaguez, within the principal city service contour of Occidental's proposed FM station at Hormigueros, which adjoins Mayaguez. (Occidental Ex. No. 1 pp. 1-2).

44. She attended grammar and high school in Mayaguez and completed her Bachelor's Degree at the University of Puerto Rico, Mayaguez. She obtained her law degree from the Catholic University, Ponce, Puerto Rico.

45. Ms. Baez has been a lawyer since 1979 and is a partner with her husband, Roberto Santos, in the law firm of Santos & Baez in Mayaguez. In the event Oc-

cidental is the successful applicant in this proceeding, she will resign from the law firm to devote her full time to Occidental's proposed station.

46. She will work at Occidental's proposed station on a full-time basis, at least forty hours per week, as general manager. In this capacity, she will supervise all aspects of station operations. She will make whatever adjustments may be necessary in her schedule to be able to carry out those full-time duties.

47. During 1988 and 1989, Ms. Baez actively participated in a campaign to raise funds to construct a new wing of "Hogar San Jose", a home for the elderly located in Hormigueros. (Occidental Ex. No. 1, pp. 2 - 3).

48. Diana Santos Tristani, a Hispanic female, has resided in Mayaguez, Puerto Rico since 1983 and will continue to live there. Mayaguez is adjacent to Hormigueros. From 1980 to 1983, she resided in Cabo Rojo, about two miles from Hormigueros. Both of these residences are within the principal city grade service contour of Occidental's proposed FM station. (Occidental Ex. No. 4, p. 1).

49. Ms. Tristani will work-full time, at least forty hours per week, as sales manager of Occidental's proposed station. In this capacity, she will be directly in charge of all sales for the station on a day-to-day basis. As an officer, director and shareholder of Occidental, she will also participate in making overall policy decisions including program policy. She will make whatever adjustments to her schedule as may be necessary to permit her to meet her full time commitment to Occidental's proposed station.

50. In 1978, Ms. Tristani worked for Ideas, Inc., an agency which specialized in programs and commercials for television.

51. Marta Lopez Negron resides in Mayaguez with her husband, Juan A. Somoza, who is also an officer, director and shareholder of Occidental. They have resided in Mayaguez for the past twelve years, and will continue to reside there. Mayaguez, adjacent to Hormigueros, is within the prinicipal city contour of Occidental's proposed FM station.

52. Ms. Negron has a Bachelor's degree with a concentration in psychology and sociology from the University of Puerto Rico, Rio Piedras, and has completed one year's work towards a Master's Degree in social work from the same institution. She also has forty-five credits in accounting and business administration from the University of Puerto Rico, Mayaguez (Occidental Ex. No. 5, p. 1).

53. In the event Occidental is the successful applicant in this proceeding, Ms. Negron will be integrated into the day-to-day operation of its proposed FM station on a full-time basis, at least 40 hours per week, as the Program Director. As such, she will be responsible for implementing the station's programming on a day-to-day basis and will supervise the station's announcing staff. She will also participate in making general and overall policy decisions for the station. She will make any adjustments to her present time commitments which may be necessary for her to meet her full-time commitment to the station.

54. Ms. Negron's civic activities include acting as a Leader Mother to help with children at "Centro Espibi", a center for children with spina bifida.

55. In 1987, she was an active member of "Fondo Lealtad 55" at the University of the Sacred Heart. This is an organization concerned with student activities needs, such as scholarships, honors programs, and tutoring. In 1987, she was a member of the "Museum of Contemporary Art" located at the University of Sacred Heart in Santurce, Puerto Rico which serves all of Puerto Rico as its only contemporary art museum (Occidental Ex. 5, p. 2; Tr. 345, 347).

56. In 1988, Ms. Negron was an officer and a member of the Board of Directors of the P.T.A. in South Western Educational Community School.

57. Fernando Luis Sumaza LaBorde, a Hispanic male, has resided within the principal city grade service contour of Occidental's proposed FM station for the past twenty-one years. At the present time, he resides with his wife, Diana Santos Tristani and their children in Mayaguez, Puerto Rico, where he will continue to live.

58. He owns and operates West Electric Corporation, an electrical contracting business located in Mayaguez. He holds a Bachelor's Degree in electrical engineering from the University of Puerto Rico, Mayaguez. (Occidental Ex. No. 2, p. 1).

59. Mr. Sumaza will be the Technical Director of Occidental's proposed station. He will serve in this capacity on a part-time basis, devoting at least twenty hours per week to this function. He will be directly responsible for the day-to-day technical operation of the station and will coordinate with Occidental's consulting engineer. He will also be responsible for the maintenance of the station's buildings, equipment, and utilities.

60. Occidental's proposed studio site is at the location of Mr. Sumaza's West Electric Corporation. Auxiliary power facilities will be installed at Occidental's proposed studio and transmitter sites to ensure continous operation of the station in the event of power outages or shortages.

61. As an officer, director and shareholder of Occidental, Mr. Sumaza will also participate in making overall policy decisions regarding the proposed station, including program policy. He will make whatever adjustments may be necessary in his schedule to meet his part-time commitment to Occidental as Technical Director.

62. From 1972 to 1976, Mr. Sumaza was an active member of the Mayaguez Lions Club, where he actively participated in various charitable activities such as providing electrical installation for an indigent family, and assisting in fundraising for various charitable organizations in the area. From 1987 to the present, he has been a member of the Mayaguez Chamber of Commerce, and from 1976 to the present, he has been an active member of the Southwestern Industrial Association. (Occidental Ex., No. 2, pp. 2-3).

63. Juan Antonio Somoza, a Hispanic male, is the Sub-Treasurer, a Director and 11.11% voting shareholder of Occidental. He has been a resident of Mayaguez, Puerto Rico, for the past twelve years, within the principal city grade service contour of Occidental's proposed FM station. He will continue to reside there in the event Occidental is the successful applicant in this proceeding.

64. Mr. Somoza holds a degree in business administration from the Catholic University of Ponce, Puerto Rico. For the past sixteen years, he has been employed at Banco Central Corp. in Mayaguez as Vice President in charge of area credit supervision. (Occidental Ex. No. 3, p. 1).

65. Mr. Somoza will work part-time, at least twenty hours per week, as the business manager of Occidental's proposed FM station. In this capacity, he will be in

charge of all general business matters relating to the station, including establishment of the station's accounting procedures, accounts receivables, accounts payable, payroll and other business matters.

66. As an officer, director and shareholder of Occidental, he will also participate in making policy decisions for the station, including program policy.

67. He will make whatever adjustments in his personal schedule as may be necessary to enable him to meet his part-time commitment to Occidental's proposed station.

68. Mr. Somoza has been involved in the following civic activities in the service area of Occidental's proposed FM station: from 1978 to 1983, he was an active member of the Mayaguez Rotary Club, where he participated in different charitable works, raising funds for various charitable organizations. From 1977 to the present, he has been a member of the Mayaguez Chamber of Commerce, and from 1976 to the present he has been a member of the Southwestern Industrial Association.

69. Luis Roberto Santos, a Hispanic male, is the Sub-Secretary, a Director and 11.11% voting shareholder of Occidental. He has resided within the proposed principal city grade service contour of Occidental's FM station for approximately thiry-five years. Since 1970 he has resided in Mayaguez, Puerto Rico. He will continue to live there. (Occidental Ex. No. 6, p. 1).

70. Mr. Santos holds B.B.A. and Juris Doctor Degrees from the University of Puerto Rico and is admitted to practice law in Puerto Rico, Washington, D.C., the U.S. District Court for the District of Puerto Rico, the U.S. Court of Appeals for the First Circuit, and the U.S. Supreme Court. He has been in the private practice of law since 1975. (Occidental Ex. No. 6, pp. 1-2).

71. Mr. Santos will be integrated into the day-to-day management and operation of Occidental's FM station on a part-time basis as public affairs director, devoting at least twenty hours per week to this position. In this capacity, he will serve as liaision between Occidental's station and all government, educational, civic community, religious, charitable and other local groups. He will also be in charge of promotional activities for the station.

72. He will make whatever adjustments in his schedule as may be necessary to enable him to meet his part time commitment to Occidental's proposed station.

73. During 1988 and 1989, Mr. Santos actively participated in raising funds to build a new wing for "Hogar San Jose", a home for the elderly in Hormigueros. From 1979 to 1986, he was an active member of the Mayaguez Rotary Club and President of its Children's Christmas Party Committee.

III. CONCLUSIONS OF LAW

Joseph Bahr

74. Joseph Bahr is the sole owner of V.I. Stereo Communications Corp., the licensee of FM station WVIS, Christiansted, St. Croix, V.I. Mr. Bahr has promised that if he is the successful applicant in this proceeding, he will divest his interest in WVIS. At the time of the hearing, Bahr had pending before the Commission a petition for Rule Making to change the community of license of WVIS from Christiansted to Vieques, an island off the east coast of Puerto Rico. In that Rule Making proceeding, Bahr has told the Commission that if relocation of WVIS to Vieques is authorized, he will operate the station at its new location. On these facts, Occidental Broadcasting claims that Bahr has made a "conflicting representation" concerning his proposed divestiture of WVIS such that the divestiture commitment here is "nullified." There has been no "conflicting representation" by Bahr. His divestiture commitment with respect to WVIS made in this proceeding will retain its vitality whether that station is rebuilt in Christiansted or the Commission authorizes its relocation to Vieques. Bahr will not be charged a diversification demerit for his current ownership of station WVIS.

75. Occidental also claims that Bahr can receive no integration credit in this proceeding because of his "integration commitment" made in the Rule Making proceeding. Says Occidental: " . . . Mr. Bahr could not both build and operate his Station WVIS in Vieques and devote his full time to the management and operation of his Hormigueros station 123 miles away." Bahr made no "integration commitment" in the Rule Making proceeding. Nor is there any inconsistency in his promise to operate the Hormigueros station from on-site and his promise to "operate" the would-be Vieques station from afar, if that should be necessary. Bahr will receive 100 percent quantitative integration credit.

76. Mr. Bahr claims minority enhancement credit as a Hispanic. Some of the opposing parties dispute the claim, saying that the state of the record leaves the matter in some doubt. With a Germanic name, an Austrian father and a mother whose parents were both Hungarian, Bahr does not seem to be of Hispanic origin. But because he is a Puerto Rico native and was raised there, and has spent about half of his life there, Bahr's identification with Hispanic culture is not unreasonable. Bahr's integration proposal is substantially enhanced on this account.

77. The integration proposal is slightly enhanced by Bahr's broadcast experience, slightly enhanced by his proposal of future local residency, and the proposal is very slightly enhanced by Bahr's promise to utilize auxiliary power.

Guillermo A. Bonet

78. Bonet is entitled to 100 percent quantitative integration credit for his proposal to work full-time as the general manger of the station. The proposal is substantially enhanced by Bonet's status as a Hispanic. The integration proposal is moderately enhanced by Bonet's life-long residency in the service area of the proposed station, and slightly enhanced by his promise of future local residency. Bonet receives a slight enahncement for his broadcast experience, and a very slight enhancement for the proposal to utilize auxiliary power.

Renacer Broadcasters Corporation

79. Renacer is entitled to 100 percent quantitative integration credit since all three of its direcors will work full-time at the proposed station in management positions. The integration proposal is substantially enhanced by the minority status of each of the directors, and moderately enhanced by the applicant's two-thirds female membership. The proposal also receives substantial enhancement because of Ms. Carril's long-term service area residence and local residence in Hormigueros, the long-term service area residency of Mr. Ramos and Ms. Morales (and their promises of future residency in Hormigueros), combined

with civic participation by the three principals in a range of activities. Finally, Renacer's integration proposal receives a slight enhancement for the broadcast experience of Mr. Ramos and Ms. Carril, and a very slight enhancement for Renacer's proposal to utilize auxiliary power.

Occidental Broadcasting Corporation

80. Occidental's Articles of Incorporation contains a statement of purposes which would appear to prohibit Occidental from possessing and/or controlling radio and/or television stations. Although Occidental apparently made some effort to amend its Articles to remove that prohibition, there is no evidence that it succeeded in doing so, that is, nothing indicates that the amendment was in fact filed with the Department of State of Puerto Rico. Renacer Broadcasters takes the position that since Occidental's Articles were not effectively amended by a filing actually received by the Department of State, Occidental is bound by the prohibitory language of the Articles and is therefore entitled to no integration credit.

81. Presumably, a Puerto Rico Corporation is bound by the statement of purposes set out in its Articles of Incorporation. Presumably, also, such a statement of purposes can be amended if necessary (Tr. 360), particularly where a mere typographical error furnishes the need for the amendment. And there is no real doubt that all Occidental needs is an amendment of its Articles to correct what is plainly a typographical error. As Renacer would have it, the presiding officer should accept an absurdity: that Occidental petitioned the Commission to allocate Channel 291A to Hormigueros, Puerto Rico (*Report and Order*, MM Docket No. 86-433, released August 14, 1987), formed a corporation named Occidental Broadcasting Corporation and filed aa application for a contruction permit to operate on the frequency, and then consciously included in its Articles a phrase which prohibited Occidental from engaging in broadcasting. The Presiding Officer declines to reach such an irrational conclusion, and Renacer's position is rejected.

82. All six of Occidental's stockholders will be integrated into the day-to-day operation of the proposed station. Three of these, each holding 11.11 percent of Occidental's stock, are proposed to work at the station part-time (at least twenty hours per week).

83. Under the formula established in *Omaha TV, Inc.*, 4 FCC Rcd. 730 (1988), Occidental receives an integration credit of 666 for the full-time participation of its three shareholders holding in the aggregate 66.66 percent of its stock $(100x\ (40/40))^2 \times .6666 = 6666$. It also receives an integration credit of 833.25 for the part-time participation of its three stockholders holding in the aggregrate 33.33 percent of its stock $(100 \times (20/40))^2 \times .3333 = 833.25$. Thus, its total integration factor is credited at 7500 (7499.2 rounded) under *Omaha TV, Inc.* standards.

84. This integration credit is qualitatively enhanced by the longtime service area residency of all six principals and some civic participation by five of them, the 66 percent full-time participation of three female principals, and the 100 percent minority participation of all six principals. Occidental also receives very slight enhancement credit for proposing the use of auxiliary power.

IV. ULTIMATE CONCLUSIONS

85. Three of the four applicants (Bahr, Bonet and Renacer) receive 100 percent full-time quantitative integration credit. Since Occidental receives less than 100 percent full-time integration credit, it ranks last among the applicants.

86. The integration proposals of Bahr, Bonet and Renacer are each equally enhanced by the 100 percent minority status of all of the principals; the enhancement in each case is substantial.

87. Bahr's integration proposal is slightly enhanced by the promise of future residency in Hormigueros, while Bonet's proposal is moderately enhanced by Bonet's long time service area residency plus a promise of future residency in Hormigueros. Neither of these proposals is augmented by any participation in civic activities by the principals. Renacer Broadcasters' integration proposal is substantially enhanced by the long-term service area residency and local resdiency in Hormigueros by one of its principals and the long-term service area residency (with promises of future local residency) by the other two principals, combined with civic participation by the three principals in a range of activities. Renacer further widens its lead with a moderate enhancement for its two-thirds female membership. The enhancements awarded to Bahr and Bonet for broadcast experience and for the proposed use of auxiliary power (slight, and very slight, respectively), do not match Renacer's lead. Furthermore, Renacer, too, receives some enhancement credit for broadcast experience and for auxiliary power. Renacer Broadcasters is the preferred applicant herein and its application will be granted.

Accordingly, IT IS ORDERED that unless an Appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Renacer Broadcasters Corporation (File No. BPH-871029MK) IS GRANTED, and the applications of Joseph Bahr (File No. BPH-871028MB), Guillermo A. Bonet (File No. BPH-871029MH), and Occidental Broadcasting Corporation (File No. BPH-871029MM) ARE DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 15, 1991

SUBMISSIONS REQUIRED OF 220 MHZ NATIONWIDE APPLICANTS

This information is issued to clarify submission requirements under Section 90.713 of the Commission's Rules for applicants for nationwide systems in the 220-222 MHz band.

Section 90.713 of the Rules, adopted in the *Report and Order* in PR Docket No. 90-552, sets entry requirements for nationwide 220 MHz systems and requires applicants to make specific submissions, including certifications, construction schedules, and financial qualifications. Section 90.713 becomes effective on July 29, 1991, 90 days after publication in the *Federal Register*. *See* 56 FR 19598 (April 29, 1991). The *Report and Order* stated that after approval of the new information collection requirements by the Office of Management and Budget, we would advise applicants when to make their submissions. No such submissions need be filed at this time. We will apprise nationwide applicants of the procedures for filing Section 90.713 submissions when we determine that it is appropriate to do so.

For further information about this matter, contact Rosalind Allen, Private Radio Bureau, Land Mobile and Microwave Division, Rules Branch at (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

Data Investments, Inc. File No. 163500-91-21-DHS

Notice of Apparent Liability
for Forfeiture for the
unauthorized construction
and operation of facilities
of Station KUC843 and Station KWU516
in the Public Land Mobile Service
at Bainbridge and Cape
Girardeau, Missouri

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 16, 1991; Released: July 19, 1991

By the Commission:

I. INTRODUCTION

1. Timothy J. Singleton (Singleton) and Marilyn K. Singleton, his wife, (jointly, the Singletons),[1] owners of Data Investments, Inc. (Data), and Star Communications, Inc. (Star), constructed and operated the base and control facilities of the captioned stations in the Public Land Mobile Service (PLMS) without prior Commission authorization, in violation of Sections 301 and 319(a) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. §301, §319(a), and Sections 22.3 and 22.43(a)(1) of the Commission's rules, 47 C.F.R. §§22.3 and 22.43(a)(1). In view of these violations, we hereby notify Data that it is apparently liable for a forfeiture as provided for in Section 503(b) of the Act, 47 U.S.C. §503(b), and 47 C.F.R. §1.80, in the amount of $150,000.

II. BACKGROUND

2. Stations KUC843 and KWU516 were licensed to Withers Communications Company (WCC). WCC's licenses expired on April 1, 1989, and WCC did not file applications for renewal of the licenses for these stations. On August 4, 1989, WCC filed applications to reinstate licenses for Stations KUC843 and KWU516.[2] Ruth H. Withers (Withers) at the time of the filing of the applications for reinstatement was 100% owner of WCC. On July 31, 1989, she entered into a management agreement with Data for Data to operate and manage WCC's stations. Singleton signed the management agreement as President of Data.

3. Data is a Commission licensee in the PLMS of Stations KNKC272 at Jackson, Missouri and KNKJ977 at Oriole, Missouri. [3] Data, d/b/a Buzz Communications, is also a licensee of Stations KNKC934 and KNKC938, at Cape Girardeau, Missouri.

4. On October 23, 1989, a Petition to Deny (Petition) the WCC reinstatement applications was filed by Dial-A-Page, alleging that Data had assumed control of WCC without prior Commission authority. On October 24, 1989, WCC filed a Request for Special Temporary Authority to continue operating its stations pending action on its reinstatement applications. On December 8, 1989, WCC filed an Opposition to the Petition, and Data filed a letter reporting that it had suspended the management agreement.[4] No transfer of control application has ever been filed to assign the licenses for Stations KUC843 and KWU516 from WCC to Singleton or his companies, and neither Data nor the Singletons has requested authority to operate stations on the frequencies for which WCC was licensed.

5. By letter dated August 23, 1990, Withers reported to the Mobile Services Division (MSD) that the Singletons had apparently relocated facilities operating on frequencies associated with WCC's Stations KUC843 and KWU516. On October 2, 1990, the MSD sent letters of inquiry to Singleton and Withers requesting information on the reported relocation. On November 5, 1990, each filed a response. Withers says that the station facilities had been at locations leased from her sons, and that only when she visited the leased space and tower in late July, 1990, did she learn that the facilities had been moved. She asserts that she still does not know where Singleton relocated the facilities. The MSD determined that Singleton's answers to its inquiry were insufficient and on November 25, 1990, sent a second letter to Singleton. In his response of December 7, 1990, Singleton acknowledged that he had relocated the facilities for Stations KUC843 and KWU516 without Commission authorization and had continued to operate them. Singleton contends that he relocated the stations to eliminate interference from another licensee and to maintain service to the public. Singleton also submits that he attempted to stay within the original contours of the referenced stations by reducing the power and antenna height of the facilities. It appears that these relocations were made without Withers' knowledge or consent and without filing applications with the Commission or receiving prior Commission authority.

6. Based on our review of the pleadings and the responses to the MSD inquiries, it is uncontroverted that, pursuant to the management agreement between WCC and Data, Singleton began operating the referenced stations on August 1, 1989. On October 24, 1989, Singleton relocated the transmitter and antenna for Station KUC843 from Bainbridge to Cape Girardeau, Missouri. On October 26, 1989, in a letter to Withers, Singleton suspended the management agreement. However, Singleton continued to operate Stations KUC843 and KWU516 through Star Communications, Inc. (Star), another management company wholly owned by the Singletons. Star received all of the money paid by subscribers and deposited it in its bank account, paid all expenses and hired one employee to manage the stations. On July 23, 1990, after the management agreement between WCC and Data was suspended, Singleton, without Commission authorization, moved the transmitter and antenna for Station KWU516 from Bainbridge to Cape Girardeau. On July 29, 1990, again without Commission authorization, Singleton moved the control stations for both WCC's Stations KUC843 and KWU516 within Cape Girardeau. Singleton continued operation of both stations until October 25, 1990.

III. DISCUSSION

7. Singleton acknowledged in his letter of December 7, 1990, that he constructed PLMS stations without prior Commission authorization and operated those stations from October 24, 1989 through October 25, 1990 without having obtained prior Commission authority. Once Data suspended its management contract on October 26, 1989 with WCC, Data no longer acted as WCC's agent. Thus, Data's use of WCC's call signs was also unauthorized. Data's conduct following suspension of its management agreement with WCC constituted violations of Sections 301 and 319(a) of the Act and Section 22.3 and 22.43(a)(1) of the Commission's rules.[5] Moreover, Data's violations were both willful and repeated within the meaning of Section 503(b) of the Act.[6]

8. Unauthorized construction and operation are serious violations. As a Commission licensee, Singleton was presumably well aware of the need to obtain Commission authorization. Singleton's conduct was particularly egregious because he was not completely forthcoming with information during the course of this proceeding. For example, he reported through counsel on December 8, 1989 that Data suspended the management agreement following the filing of the Petition against WCC, yet failed to report that he had already "relocated" Station KUC843, and was continuing to operate it as his own. Singleton apparently ceased operations of this base station, and of all other facilities that he subsequently relocated, on October 25, 1990, only after the Commission sent its initial letter of inquiry on October 2, 1990. We consider Singleton's failure to provide complete information as a factor in evaluating what penalties should be assessed based upon the violations of the Act and the Commission's rules that have occurred. We also find that Withers abdicated her responsibility as a licensee, failing to renew her licenses and oversee Data, and withdrew applications for reinstatement. In view of these facts and the circumstances surrounding Singleton's unauthorized operation, we do not believe it necessary to take remedial action against her.

9. In determining appropriate penalties, we are required to consider "the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. §503(b)(2).[7] After considering all relevant factors and the circumstances of this case, as discussed above, including the gravity of Singleton's offenses and his apparent ability to profit from his actions through Data and Star, we conclude that a forfeiture of $150,000 for the unauthorized construction and operation of the base and control facilities of Stations KUC843 and KWU516 is appropriate.[8]

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503, and Section 1.80 of the Commission's rules; 47 C.F.R. §1.80, that Data Investments, Inc. is apparently liable for forfeiture of $150,000, for constructing and operating the base and control facilities of Stations KUC843 and KWU516 in violation of Sections 301 and 319(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§301, 319, and Sections 22.3, and 22.43(a)(1) of the Commission's rules, 47 C.F.R. §§22.3 and 22.43(a)(1).

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. §1.80(f)(3), that Data Investments, Inc. may within 30 days of the date of this notice, pay the full amount of forfeiture or may file a response showing why a forfeiture should not be imposed or should be reduced. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission to: Federal Communications Commission, Financial Services Branch, P.O. Box 19209, Washington, D.C. 20036. *See* 47 C.F.R. §1.80(h).

12. IT IS FURTHER ORDERED, that a copy of this Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to Data Investments, Inc., P.O. Box 537, Cape Girardeau, Missouri 63702-0537.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] While the facts of this case variously identify Singleton, the Singletons, Data and Star as parties to agreements or perpetrators of unlawful acts, we hold Data responsible because it is the seminal party of interest in the underlying transactions and agreements, and Singleton acted as an officer of a Commission licensee.

[2] File No. 31506-CD-P/ML-89 for Station KUC843, and File No. 31507-CD-P/ML-89 for Station KWU516, both with locations at Bainbridge, Cape Girardeau, and Sikeston, Missouri.

[3] The Commission granted assignment of licenses for both stations to Data from Semo Mobile Communications, Inc. (Semo) on June 6, 1990. *See* Report No. PMS-90-36-A (released June 6, 1990) (June 6, 1990 Public Notice). Both stations are located in the Cape Girardeau, Missouri area.

[4] The Common Carrier Bureau dismissed WCC's Applications to Reinstate Licenses at WCC's request. *See* Public Notice, Report No. PMS-91-21-A (released February 20, 1991). As a result, the Petition to Deny WCC's applications is moot.

[5] Section 301 of the Act provides in relevant part that "[n]o person shall use or operate" a radio station without "a license in that behalf granted under the provisions of this Act."

Section 319(a) of the Act provides in relevant part that "[n]o license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission." Even though the Commission no longer issues "construction permits" to PLMS applicants under Section 319(d) of the Act, 47 U.S.C. §319, it still requires prior authorization pursuant to Section 22.43(a)(1) of the rules prior to constructing facilities. *See Rules to Allow Public Mobile Service Applicants to Commence Construction Prior to*

Authorization, 4 FCC Rcd 5960, n.6 (1989). Therefore, Section 319(a) of the Act generally prohibits construction of PLMS station facilities without authorization.

Section 22.3 of the Commission's rules states, in pertinent part, as follows: "No person shall use or operate any device for the transmission of energy or communications by radio with services, authorized by this part except as provided in this part." 47 C.F.R. §22.3.

Section 22.43(a)(1) provides, in pertinent part: " . . . [A] radio station authorization shall specify the date of grant as the earliest date for commencement of construction." 47 C.F.R. §22.43(a)(1).

[6] Section 503 (b) of the Communications Act states, in pertinent part, as follows:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have . . .
>
> (B) . . . willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act . . .
>
> shall be liable to the United States for a forfeiture penalty.

See also Section 312(f) of the Act, which defines willful for purposes of Section 503 as well as 312. *See* H. Rep. No. 765, 97th Cong. 2d Sess. 50-51 (1982). *See also MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.22 (1988) (subsequent history omitted).

[7] Data owns four common carrier stations in the Cape Girardeau, Missouri area. *See* para. 3, *supra*. Although providing paging service on a small regional basis, Data expanded its market presence with two of those stations, which were assigned from Semo, *see* note 3 *supra*, and apparently continued service during the period of Singleton's violations.

[8] In light of the one-year statute of limitations, the forfeiture covers the July, 1990 unlawful relocation of the base and control facilities for KWU516 and the July, 1990 unlawful relocation of the control facilities for KUC843, as well as the unlawful operation of both stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-168

In the Matter of

Codification of the
Commission's Political
Programming Policies

ORDER

Adopted: July 18, 1991; Released: July 19, 1991

By the Chief, Mass Media Bureau:

1. The National Association of Broadcasters and other interested parties request an extension of the time within which to file comments in the above captioned proceeding.[1] Comments are now scheduled to be filed on July 26, 1991, and reply comments are scheduled to be filed on August 14, 1991. Based on the complexity of the matters raised in the *Notice* in this proceeding, the petitioners request that the time for filing comments be extended until August 9, 1991, and the reply comment date be extended until August 23, 1991.

2. Petitioners have shown good cause for this brief extension of time that will prolong the comment period in this proceeding by only 9 days. *See* 47 C.F.R. § 1.46.

3. Accordingly, IT IS ORDERED that, pursuant to authority delegated to the Chief, Mass Media Bureau in 47 C.F.R. § 0.283, the time for filing comments and reply comments in this proceeding ARE EXTENDED to August 9, 1991, and August 23, 1991, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] In addition to the National Association of Broadcasters, the parties joining this request are: Allbritton Communications Company; American Family Broadcast Group, Inc.; Association of Independent Television Stations; CBS, Inc.; the Law Firm of Dow Lohnes & Albertson; the Law Firm of Fisher Wayland Cooper & Leader; the Law Firm of Fletcher Heald & Hildreth; Fox Television Stations, Inc.; and National Broadcasting Company, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-219

In the Matter of

Amendment of Section 73.202(b), RM-7729
Table of Allotments,
FM Broadcast Stations.
(Brillion, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 8, 1991; Released: July 26, 1991

Comment Date: September 16, 1991
Reply Comment Date: October 1, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Brillion Radio Company ("petitioner") requesting the substitution of FM Channel 298C3 for Channel 298A, Brillion, Wisconsin.[1] Petitioner also requests modification of the construction permit for Station WEZR(FM), Channel 298A, to specify operation on Channel 298C3 (BPH-880815MS). Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal would provide Brillion with a wide coverage area FM station. Channel 298C3 can be allotted to Brillion, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 18 kilometers (11.2 miles) northeast of the community.[2] Channel 298A is short spaced to vacant Channel 298A, Mishicot, Wisconsin. However, Channel 234A has been substituted for Channel 298A at Michicot in MM Docket No. 89-282. We shall also propose to modify petitioner's construction permit for Station WEZR(FM) to specify operation on Channel 298C3 in lieu of Channel 298A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Brillion or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. We believe the public interest would be served by proposing the allocation of Channel 298C3 to Brillion, Wisconsin, since it could provide the community with a wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Brillion, Wisconsin	298A	298C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 16, 1991,** and reply comments on or before **October 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Lyle R. Evans
Brillion Radio Company
1296 Marian Lane
Green Bay, Wisconsin 54304

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The construction permit for Station WEZR(FM) was modified to specify operation on Channel 298A in lieu of Channel 242A in MM Docket 89-282, effective July 1, 1991. *See* 6 FCC Rcd 2624 (1991).

[2] The coordinates for Channel 298C3 are 44-19-10 and 87-57-30.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-74

In the Matter of

Amendment of Section 73.202(b),	RM-7163
Table of Allotments,	
FM Broadcast Stations.	
(West Palm Beach, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1991; Released: July 26, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1827 (1991), issued in response to a petition for rule making filed by Pearl Broadcasting, Inc. ("petitioner"), licensee of Station WNGS(FM), Channel 221A, West Palm Beach, Florida, proposing the substitution of Channel 221C3 for Channel 221A at West Palm Beach, and modification of its license to specify the higher powered channel. Petitioner filed comments and supplemental comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 221C3 for Channel 221A at West Palm Beach, since it could provide a wide coverage area FM service to the community. Channel 221C3 can be allotted to West Palm Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.6 kilometers (7.2 miles) north, in order to avoid a short-spacing to a construction permit for Station WZZR(FM), Channel 224C2, Stuart, Florida. [1] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WNGS(FM) to specify operation on Channel 221C3 in lieu of Channel 221A at West Palm Beach, Florida.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
West Palm Beach, Florida	221C3, 282C, 300C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WNGS(FM), West Palm Beach, Florida, IS MODIFIED, to specify operation on Channel 221C3 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 221C3 at West Palm Beach are North Latitude 26-49-14 and West Longitude 80-02-26. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WCMQ(FM), Channel 222C2, Hialeah, Florida, at coordinates 25-46-29 and 80-11-19, and Station WZZR(FM)'s construction permit for Channel 224C2 at Stuart, Florida, at coordinates 27-16-32 and 80-17-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WATS/800, INC. File No. I-T-C-91-100

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 18, 1991; Released: July 26, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by WATS/800, Inc.

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-100 IS GRANTED and WATS/800, Inc. is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1, 2 and 12, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-132

Application for authority to acquire and operate facilities for direct service between the U.S. and Turkey.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 18, 1991; Released: July 26, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Turkey by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-132 IS GRANTED, and US Sprint is authorized to:

a. utilize for service to Turkey its previously authorized interest in 30 64-Kbps circuits in the PTAT-1 cable;[1]

b. acquire from Cable and Wireless and operate 30 circuits of DDP (droit de passage) facilities between the PTAT-1 cablehead and UK-France 3 cablehead in England;

c. acquire from Mercury Communications and operate 30 half-circuits in the UK-France 3 cable;

d. lease from France Telecom and operate 30 circuits in DDP facilities in France between the UK-France 3 cablehead in Dieppe and the Marseille-Palermo cablehead in Marseille;

e. acquire from France Telecom and operate 30 half-circuits in the Marseille-Palermo cable;

f. acquire from Italcable and operate 30 half-circuits in the EMOS cable[2] between Palermo and Turkey; and

g. use said facilities to provide US Sprint's regulaly authorized services between the U.S. and Turkey and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Turkey and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See Memorandum Opinion, Order and Authorization*, DA 89-940 released August 14, 1989, File No. I-T-C-89-084, 4 FCC Rcd 6279 (1989). All terms and conditions of that Order remains the same.

[2] US Sprint states that its correspondent in Turkey has agreed to provide all matching facilities required, including one half of all costs associated in the lease of DDP facilities, and all matching cable facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SONICRAFT, INC. File No. I-T-C-91-131

Application for authority to operate
as an international resale carrier.

LA CONEXION FAMILIAR, INC. File No. I-T-C-91-133

Application for authority to operate
as an international resale carrier.

AMERIVISION COMMUNICATIONS, INC. File No. I-T-C-91-138

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 18, 1991; Released: July 26, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by La Conexion Familiar, Inc. (La Conexion) and AmeriVision Communications, Inc. (AmerVision), and international switched voice and data services by Sonicraft, Inc. (Sonicraft).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-131, I-T-C-91-133 and I-T-C-91-138 ARE GRANTED, and

a. La Conexion is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs;

b. AmeriVision is authorized to provide international switched voice services by the resale of the international switched voice services set forth in US Sprint's Tariff F.C.C. Nos. 1 and 2 between the U.S. and the points listed in that tariff; and

c. Sonicraft is authorized to provide international switched voice and data services by the resale of international switched voice and data services set forth in AT&T's Tariffs F.C.C. Nos. 1, 2 and 12, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that Sonicraft is limited, under this order, to the provision of international switched voice and data services. Nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

4. Copies of any operating agreements entered into between each applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that each applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that each applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Notice of Apparent
Liability for Forfeiture of

VICTORIA CELLULAR CORPORATION File No. 163500-91-18-ALN

For failure to file notification of construction of a new cell for Station KNKA730 in the Domestic Public Cellular Radio Telecommunications Service serving Market 300A, Victoria, Texas

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 17, 1991; Released: July 26, 1991

By the Commission:

1. On May 5, 1988 the Commission granted Victoria Cellular Corporation (Victoria) authority to construct a new cell and increase the power for Station KNKA730. This authority required that construction be completed and that the facility be in operation by May 5, 1989. The facility was constructed and placed in operation within the required period. The Commission was not, however, timely notified by FCC Form 489, Notification of Status of Facilities, that the new cell had been placed in operation. Consequently, the authorization automatically expired pursuant to 47 C.F.R. Section 22.9 (b)(3).

2. On August 22, 1990, Victoria filed a request for Special Temporary Authority (STA) to continue to operate the facilities under call sign KNKA730 pending Commission action on a concurrently filed application for reinstatement of the expired authorization.[1] Temporary Authority was granted September 10, 1990. A request for extension of the STA was filed on December 10, 1990.

3. Section 22.3 of the Commission's rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Victoria's authority to construct and operate the new cell automatically expired on May 15, 1989, when it failed to file FCC Form 489. Thus, it is determined that an apparent violation of Section 22.3 of the Commission's rules has occurred for operating a facility in an unauthorized manner after that date.

4. Section 503(b) of the Communications Act states, in pertinent part, as follows:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have . . .
>
> (B) . . . willfully or repeatedly failed to comply with any of the provisions of this Act or if any rule, regulation, or order issued by the Commission under this act, . . . shall be liable to the United States for a forfeiture penalty.
>
> (2) . . . each day of a continuing violation shall constitute a separate offense.

We find that Victoria's operation of the facility from May 5, 1989 until August 22, 1990, when it filed the STA request, constitutes willful and continuing conduct within the terms of the statute.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, IT IS ORDERED that Victoria Cellular Corporation be advised of an APPARENT LIABILITY FOR FORFEITURE of $15,000 for willful violations of the aforementioned rules from May 5, 1989 until August 22, 1990. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communicatiions Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The application for reinstatement will be addressed by the staff of the Mobile Services Division in accordance with established procedures.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

ELLIPSAT CORPORATION — File No. 11-DSS-P-91(6)

For Authority to Construct
an Elliptical Orbit
Communication Satellite
System in the 1610-1626.5 MHz
and 2483.5-2500 MHz Bands

MOTOROLA SATELLITE COMMUNICATIONS, INC. — File Nos. 9-DSS-P-91(87), CSS-91-010

For Authority to Construct
a Low Earth Orbit Satellite
System in the 1610-1626.5 MHz Band

ORDER

Adopted: July 17, 1991; Released: July 18, 1991

By the Chief, Domestic Facilities Division:

1. American Mobile Satellite Corporation (AMSC) has filed a Motion for Extension of Time in which to file responses in the above-captioned proceedings. These applications were accepted for filing on April 1, 1991. *See* Public Notice, Report No. DS-1068, DA 91-407 (released April 1, 1991). This public notice established the following schedule for filing pleadings: June 3, 1991-comments, petitions and competing applications; July 3, 1991-oppositions and reply comments, and July 22, 1991-responses. AMSC requests an extension from July 22, 1991 to August 16, 1991 in which to file responses.

2. In support of its request, ASMC cites the volume of pleadings and applications and the substantial disagreements revealed in the reply comments which will need to be addressed in the responses. AMSC indicates that more time is needed to prepare a thorough response to the pleadings filed thus far in these proceedings. Additionally, AMSC states that its ability to respond by the July 22 deadline is complicated by the fact that key AMSC technical personnel are involved in the U.S. preparations for the upcoming CCIR Study Group 9 meeting in Geneva. AMSC indicates that this preparation process should be completed by the end of July. Further, AMSC states that grant of this extension will not delay the processing of these applications.

3. We agree that partial grant of this request will not delay action on the above-captioned applications. No oppositions to this request have been filed. However, an extension until August 16, 1991, almost four weeks, is not justified. A two-week extension should give the parties sufficient time to evaluate the filings in these proceedings and to prepare their responses.

4. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, the date for filing responses on the applications of Ellipsat Corporation and Motorola Satellite Communications, Inc. originally due on July 22, 1991 is extended until August 5, 1991.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

ORDER DENYING EXTENSION OF TIME

Adopted: July 17, 1991; Released: July 17, 1991

By the Chief, Mass Media Bureau:

1. On June 21, 1991, the Media Access Project (MAP) requested an extension of time for filing comments and reply comments in response to the *Notice of Proposed Rule Making* in MM Docket No. 91-140, 6 FCC Rcd 3275 (1991). Comments are currently due on August 5, 1991, and reply comments are due on September 5, 1991. MAP requests that the comment date be extended to September 5, 1991, and the reply comment date to October 5, 1991.

2. MAP argues that the time period established by the Commission for filing comments is generally too short to obtain a complete record on the broad range of issues involved in this rule making. It pleads more specifically that the comment and reply periods coincide with vacation plans and reduced availaoility of personnel. It also observes that there is another rulemaking proceeding with overlapping comment and reply periods in which it wishes to participate.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. MAP has not set forth reasons sufficiently compelling to justify extension of the comment and reply periods designated for this proceeding.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by the Media Access Project IS DENIED.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.204(b), 0.283 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.204(b), 0.283, 1.46.

6. For further information concerning this proceeding, contact Jane Hinckley, Policy and Rules Division, Mass Media Bureau ((202) 632-7792).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-189

In re Applications of

DAVID T. MURRAY and MARTHA R. MURRAY d/b/a MURRAY COMMUNICATIONS (hereafter "Murray")	File No. BPH-900220MM
EVELYN HOLT PARKER (hereafter "Parker")	File No. BPH-900220MN
SULLIVAN COUNTY BROADCASTING (hereafter "Sullivan")	File No. BPH-900220MO
COLONIAL BROADCAST SYSTEMS, INC (hereafter "Colonial")	File No. BPH-900220MP
RADIO READING SERVICES CORPORATION (hereafter "Reading")	File No. BPH-900220MC (HEREIN DISMISSED)

For Construction Permit
for a New FM Station on
Channel 290A (105.9 MHz)
in Colonial Heights, Tennessee

HEARING DESIGNATION ORDER

Adopted: June 19, 1991; Released: July 25, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Reading.* Reading lists the site elevation of its proposed transmitter as 518.16 meters (*1,700* feet) AMSL in Section V-B of its application. An examination by the staff of the site map submitted by Reading as Exhibit V-2, however, reveals an actualite elevation of *1,740* feet AMSL. Thus, the applicant's proposed antenna height would exceed 100 meters HAAT, over the maximum for a Class A facility and in violation of 47 C.F.R. Section 73.211. Further, Reading has not requested a waiver of that rule. Accordingly, insofar as Reading's application has been inadvertently accepted for filing, it will be dismissed and returned herein.

3. The applicants propose to locate their transmitting antennae on new towers. Our engineering study indicates that no applicant here addressed the matter or how it proposed to resolve any RF exposure to workers on the tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that the applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice entitled* "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the environment," released January 24, 1986. Under the Commission's rules, applicants must determine whether or not their proposals would have a significant effect under the criteria set forth in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the Section 1.1307(b) criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers of levels of RF radiation exceeding specific standards. Since none of the applicants indicated how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, all will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluation Compliance With FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Accordingly, the applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980).

4. The engineering staff's evaluation of the remaining applications reveals that differing boundaries were specified for Colonial Heights. Thus, the staff could not evaluate with confidence the proposals for compliance with principal coverage requirements of 47 C.F.R. Section 73.315(a). Determinations of substantial compliance with that rule and accurate measurements cannot be made where applicants base their coverage predictions on inconsistent assessments of city boundaries. In order to properly evaluate the contentions of each applicant in this regard, the Commission must be assured that each bases its proposal and computations on a fixed set of city boundaries. This will enable the agency to examine the applications and the assertions therein from a standard frame of reference. Accordingly, an appropriate city coverage issue will be specified as to all remaining applicants.

[1] The application of T.C. Monte, Inc. (BPH-900220ML) for this frequency was returned, along with a number of other Monte applications, by letter of April 27, 1990. A petition for reconsideration was filed on May 31, 1990. The petition will be handled in a separate proceeding.

5. *Murray*. An examination of Murray's application reveals that its proposal is short-spaced to rule making proposal to reassign Channel 291A from Saltville, Virginia, to Jefferson, North Carolina, and to upgrade the allotment to C3 status in MM Docket No. 91-137. Murray will be allowed to proceed with its proposal in a Colonial Heights comparative hearing. However, any construction permit awarded Murray as a result of the instant licensing proceeding shall be contingent upon the outcome of the referenced rule making proceeding.

6. *Parker*. Parker submitted an engineering amendment purporting to correct the geographic coordinates of an existing tower on which she proposes to locate her transmitter. However, the amendment specifies an antenna height AMSL of *687.6* meters, whereas the value computed from the site elevation and tower height is *678.6* meters. Inasmuch as the discrepancy is found in an amendment, and because Parker proposes to utilize an existing tower, the discrepancy is neither a tenderability nor an acceptability defect. However, Parker must file an additional amendment eliminating the discrepancy. Consultation with the tower owner in order to reaffirm both the correct geographic coordinates and tower height AMSL is advised.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Murray or by Sullivan would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

8. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Parker petitioned for leave to amend her application on October 23, 1990, and Murray on March 12, 1991. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as or right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Murray, Parker, Sullivan, and/or Colonial in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether the proposal of Murray, of Parker, of Sullivan, or of Colonial would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by Murray or by Sullivan would constitute a hazard to air navigation.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. Accordingly, IT IS ORDERED, That the application submitted by Reading IS RETURNED.

13. IT IS FURTHER ORDERED, That the applicants shall submit to the presiding Administrative Law Judge, within 30 days of the release of this Order, amendments which address the measures to be taken to limit RF exposure as specified in Paragraph 3 herein.

14. IT IS FURTHER ORDERED, That any construction permit awarded to Murray is conditioned upon the outcome of the allotment rule making proceeding in MM Docket No. 91-137.

15. IT IS FURTHER ORDERED, That Parker shall submit to the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment indicating the correct antenna height AMSL as specified in Paragraph 6 herein.

16. IT IS FURTHER ORDERED, That he petitions for leave to amend filed by Murray and by Parker ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section

1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-197

In re Applications of

KENNETH OSBORNE (hereafter "Osborne") File No. BPH-891219MI

HOBART C. JOHNSON (hereafter "Johnson") File No. BPH-891227MG

For Construction Permit
for a New FM Station
on Channel 298A
in Virgie, Kentucky

HEARING DESIGNATION ORDER

Adopted: June 24, 1991; Released: July 25, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Osborne.* On April 9, 1990, Osborne filed a "Motion to Dismiss as Unacceptable for Filing Application of Hobart C. Johnson". Osborne's pleading is essentially a petition to specify issues. Since the Commission's Report and Order in re *Revised Procedures; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this pleading have not been considered. Accordingly, an oportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229 of the Commission's Rules.

3. Osborne stated in his application that he is president and director of White Water Broadcasting, Inc., licensee of WECL-FM in Elkhorn, Kentucky. Commission records indicate that in 1990, the stock of the corporation was transferred to Gary K. Justice, the name was changed to Justice Broadcasting Group, Inc., and the call letters of the station were changed to WRAU(FM). Osborne has indicated his intent to terminate his relationship with WRAU(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Osborne's application, Osborne will be required to sever any connection with WRAU(FM) prior to the commencement of program test authority.

4. *Johnson.* Section II, Item 6 of FCC Form 301 requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Johnson has not completed Item 6 correctly. Johnson's application gives a post office box number as the residence address for Hobart C. Johnson. Accordingly, Johnson must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

5. *Other Matters.* Both of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Osborne and Johnson failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Osborne and Johnson will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Osborne and Johnson in which it is concluded that the proposed facilities are likely

to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the "Motion to Dismiss as Unacceptable for Filing Application of Hobart C. Johnson" is dismissed.

9. IT IS FURTHER ORDERED, That, in the event of grant of Osborne's application, Osborne will be ordered to divest himself of all interests in and sever all connections with Station WRAU(FM) prior to the commencement of program test authority.

10. IT IS FURTHER ORDERED, That Johnson shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That, in accordance with pargraph 5 hereinabove, Osborne and Johnson shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-196

In re Applications of

WLIK, INC. File No. BPH-900222MP
(hereafter "WLIK")

WNPC, INC. File No. BPH-900222MQ
(hereafter "WNPC")

For Construction Permit
for a New FM Station on Channel
225A in Newport, Tennessee

HEARING DESIGNATION ORDER

Adopted: June 24, 1991; Released: July 25, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matter.* On January 18, 1990, a complaint was filed with the Tennessee Department of Human Rights against WNPC, also the licensee of WNPC(AM), Newport, Tennessee. The complainant, a former announcer at WNPC(AM), has alleged, and WNPC has denied, that the complainant was improperly terminated on the basis of his age. Since this complaint is still pending, an appropriate condition will therefore be specified below.

3. *Environmental.* Both of the captioned applicants propose to locate their transmitting antennas on new towers. Our engineering study indicates that the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since WLIK and WNPC failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, WLIK and WNPC will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

4. *EEO.* The Commission requires that if there will be five or more full-time station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although WLIK and WNPC have filed such statements, they are deficient. Both WLIK and WNPC have not supplied the name and/or title of the official who will be responsible for implementing the station's EEO program in response to Section II and WNPC has not listed a women's organization in response to Section IV. Accordingly, WLIK and WNPC will be required to file an amended EEO program with the presiding Administrative Law Judge or an appropriate issue will be specified by the Judge.

5. *Financial.* Section III, Item 3 of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. WNPC has not provided a contact person as requested in Item 3. Accordingly, WNPC must file an amendment which gives all the information required by Section III, Item 3 with the presiding Administrative Law Judge after this Order is released.

[1] The application of Appalachian Educational Communications Corporation (Appalachian), BPED-900222MD, was mutually exclusive with the applications of WLIK and WNPC for a new FM in Newport, Tennessee. Appalachian's application was also mutually exclusive with an application to modify the facilities of an existing station, WCKS(FM), Karns, Tennessee. However, on November 26, 1990, the Commission staff granted a request for approval of a settlement agreement between Appalachian and WCKS Broadcasting, Ltd. (WCKS), whereby WCKS was to pay Appalachian $20,000 to dismiss its application for a new FM station in Newport, Tennessee.

6. *Other matters.* Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issue specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to WLIK and WNPC in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to WNPC as a result of this proceeding, its grant will be without prejudice to whatever action, if any, the Commission deems appropriate in light of the outcome of the pending complaint discussed in paragraph 2.

10. IT IS FURTHER ORDERED, That, in accordance with paragraph 3 hereinabove, WLIK and WNPC shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That WLIK and WNPC shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That WNPC shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-42

In the Matter of

Amendment of Section 73.202(b), RM-7616
Table of Allotments,
FM Broadcast Stations.
(Eldon, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 8, 1991; Released: July 26, 1991

By the Chief, Allocations Branch:

1. At the request of Rivertown Communications Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1323 (1991), proposing the allotment of Channel 282C3 to Eldon, Iowa, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 282C3 to Eldon, Iowa, because it could provide the community with its first local FM service. Channel 282C3 can be allotted to Eldon in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) south to avoid a short-spacing to Station KTOF, Channel 283C1, Cedar Rapids, Iowa. [1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 9, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Eldon, Iowa	282C3

4. The window period for filing applications will open on **September 10, 1991**, and close on **October 10, 1991**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 282C3 at Eldon are North Latitude 40-51-15 and West Longitude 92-15-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-220

In the Matter of

Amendment of Section 73.202(b), RM-7746
Table of Allotments,
FM Broadcast Stations.
(Bishop, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 8, 1991; Released: July 26, 1991

Comment Date: September 16, 1991
Reply Comment Date: October 1, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Cismek Corporation ("petitioner"), licensee of Station KFLZ(FM), Channel 296A, Bishop, Texas, requesting the substitution of Channel 299C3 for Channel 296A at Bishop, and the modification of Station KFLZ(FM)'s license to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 299C3 for Channel 296A at Bishop, Texas, since it could enable Station KFLZ(FM) to expand its coverage area. Channel 299C3 can be allotted to Bishop in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.7 kilometers (6.0 miles) northeast to accommodate petitioner's desired transmitter site. [1] As requested, we also propose to modify petitioner's authorization for Station KFLZ(FM) to specify operation on Channel 299C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the Channel 299C3 at Bishop or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Since Bishop is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government will be requested. In addition, the proposal must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Kingsville, Texas.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bishop, Texas	296A	299C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 16, 1991**, and reply comments on or before **October 1, 1991**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joe Cisneros, President
Cismek Corporation
110 East Main Street
Bishop, Texas 78343
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 299C3 at Bishop are North Latitude 27-38-27 and West Longitude 97-43-33.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-619

In the Matter of

Amendment of Section 73.202(b), RM-7565
Table of Allotments,
FM Broadcast Stations.
(Houston and Thayer, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1991; Released: July 26, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7678 (1990), proposing the substitution of FM Channel 257C2 for Channel 257A at Houston, Missouri. The *Notice* was issued in response to a petition filed by Texas County Radio, Inc. ("petitioner"). Petitioner also requested modification of its license for Station KUNQ(FM) to specify operation on the higher class channel. Petitioner's proposal requires the substitution of Channel 222A for vacant Channel 257A at Thayer, Missouri. [1] Petitioner filed comments and reply comments reaffirming its interest in Channel 257C2 at Houston. C. R. Crisler filed comments and a counterproposal. [2]

2. We believe the public interest would be served by the substitution of FM Channel 257C2 for Channel 257A at Houston, since it would provide the community with a wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site. [3] As indicated in the *Notice*, it is necessary to substitute Channel 222A for Channel 257A at Thayer, Missouri. The substitution at Thayer can be accomplished in compliance with the minimum distance separation requirements with a site restriction 5.6 kilometers (3.5 miles) east of the community. [4] The site restriction will prevent a short spacing to the construction permit for Station KKOZ-FM, Channel 222A, Ava, Missouri. In addition, we have authorized a modification of petitioner's license for Station KUNQ(FM), Houston, Missouri, to specify operation on Channel 257C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 9, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Houston, Missouri	257C2
Thayer, Missouri	222A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KUNQ(FM), Houston, Missouri, IS MODIFIED to specify operation on Channel 257C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the counterproposal filed by C. R. Crisler IS DISMISSED.

6. The window period for filing applications for Channel 222A at Thayer, Missouri, will open on **September 9, 1991**, and close on **October 10, 1991**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

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[1] The construction permit held by Thayer Community Radio, Ltd., for Channel 257A at Thayer was deleted by letter on March 28, 1988 (BMPH-850917IK, BAPH-871104HH and BMPH-871214JG). The *Notice* stated that a new filing window for a channel at Thayer would be opened upon termination of this proceeding.

[2] C. R. Crisler ("Crisler") counterproposed the allotment of Channel 222C2 or Channel 257C2 at Thayer or the allotment of a C3 channel at Houston and Thayer. Crisler neglected to provide coordinates or an engineering study showing that Channel 222C2 or Channel 257C2 could be allotted to Thayer. Furthermore, he failed to specify which channels could be alloted to Thayer or Houston as C3 allotments. Nevertheless, a staff engineering study was performed which indicates that Channel 222C2 at Thayer is short spaced to Station KKOZ-FM, Channel 222A, Ava, Missouri, and Channel 257C2 at Thayer is short spaced to existing Channel 257A at Houston. Neither channel can be allotted to Thayer in compliance with Section 73.207 of the Commission's Rules. Therefore, Crisler's counterproposal will be dismissed.

[3] The coordinates for Channel 257C2 at Houston are 37-06-15 and 91-50-30.

[4] The coordinates for Channel 222A at Thayer are 36-30-13 and 91-28-56.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-123

In the Matter of

Amendment of Section 73.202(b), RM-7693
Table of Allotments,
FM Broadcast Stations.
(Newton, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1991; Released: July 26, 1991

By the Chief, Allocations Branch:

1. Pursuant to the request of S. Kent Lankford ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 2213 (1991), proposing the substitution of Channel 278B1 for Channel 278A at Newton, Illinois, and the modification of his construction permit (BPH-880727MI) for Station WIKK to specify operation on the higher class channel. Petitioner filed comments stating his intention to apply for Channel 278B1, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 278B1 for Channel 278A at Newton since it would provide that community with an expanded coverage area FM service. Channel 278B1 can be allotted to Newton in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, with a site restriction of 9.9 kilometers (6 miles) northwest of the community. [1] The site restriction is necessary in order to avoid short-spacings to a construction permit for Station WUEZ(FM), Channel 278A, Christopher, Illinois, and the licensed sites of Station WFIU(FM), Channel 279B, Bloomington, Illinois, and Station WDBR(FM), Channel 279B, Springfield, Illinois. In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the construction permit (BPH-880727MI) for Station WIKK to specify operation on Channel 278B1.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 9, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Newton, Illinois	278B1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit (BPH-880727MI) for Station WIKK, Newton, Illinois, IS MODIFIED, to specify operation on Channel 278B1 in lieu of Channel 278A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 278B1 at Newton are North Latitude 39-04-31 and West Longitude 88-11-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

ERRATUM

Released: July 26, 1991

By the Chief, Allocations Branch:

1. On April 12, 1991, the Commission released an *Order*, 6 FCC Rcd 2006 (1991), in the above captioned proceeding. The *Order* incorrectly states that Channel 251C2 was substituted for Channel 251C1 at Live Oak, Florida. Instead, the Commission had recently substituted Channel 251C1 for Channel 251C2 at Live Oak, pursuant to the *Report and Order*, MM Docket 90-546, 6 FCC Rcd 1398 (1991). Therefore, the *Order* is hereby corrected to remove Channel 251C1/251C2, Live Oak, Florida, from the list of communities and channels affected by that action.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-117

In the Matter of

Amendment of Section 73.202(b), RM-7670
Table of Allotments,
FM Broadcast Stations.
(Edgewater, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1991; Released: July 26, 1991

By the Chief, Allocations Branch:

1. Pursuant to the request of deHaro Radio, Ltd. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 2198 (1991), proposing the substitution of Channel 226C3 for Channel 226A at Edgewater, Florida, and the modification of its construction permit (BPH-880406MI) to specify operation on the higher class channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 226C3 for Channel 226A at Edgewater, Florida, since it would provide Edgewater with an expanded coverage area FM service. Channel 226C3 can be allotted to Edgewater in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, with a site restriction of 8.4 kilometers (5.2 miles) south of the community. [1] In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the construction permit (BPH-880406MI) to specify operation on Channel 226C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 9, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Edgewater, Florida	226C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit (BPH-880406MI), Edgewater, Florida, IS MODIFIED, to specify operation on Channel 226C3 in lieu of Channel 226A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 226C3 at Edgewater are North Latitude 28-54-52 and West Longitude 80-53-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture — **CC Docket No. 89-79**

Policy and Rules Concerning Rates for Dominant Carriers — **CC Docket No. 87-313**

REPORT AND ORDER & ORDER ON FURTHER RECONSIDERATION & SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

Adopted: June 13, 1991; Released: July 11, 1991

Comment Date: August 26, 1991
Reply Comment Date: September 25, 1991

By the Commission:

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Appendix A: Amendments to the Code of Federal Regulations

Appendix B: Lists of Commenters

Appendix C: Summary of Filing Requirements

I. INTRODUCTION

1. This order amends the Commission's Part 69 access charge rules to enable the Bell Operating Companies (BOCs) to offer unbundled Open Network Architecture (ONA) services, as required by our *ONA Orders*.[1] In addition, this order modifies the *LEC Price Cap Order* new services test to give additional pricing flexibility to price cap local exchange carriers (LECs), although the pricing rules continue to require price cap LECs to provide detailed cost support for new services, including their initial prices for basic service elements (BSEs). Once initial prices for "new" ONA services become effective and adequate historical data have been generated, the services will be brought under price caps, subject to an additional disclosure requirement. In this order we also retain the current enhanced service provider (ESP) exemption in its current form. Finally, we invite comment on the limited issue of the pricing rules that should apply to additional basic service elements (BSEs) offered by the BOCs in the future, if the BSEs are "restructured" services under the price cap rules.[2]

[1] Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1 (1988) (*BOC ONA Order*); Memorandum Opinion and Order, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*).

[2] Parties filing comments and reply comments in the *Part 69/ONA* proceeding are listed in Appendix B. Parties filing comments in the LEC Price Cap proceeding are listed in Appendix C.

II. BACKGROUND

2. In the *Computer III* proceeding,[3] the Commission replaced the structural separation requirements for BOC enhanced service operations with nonstructural safeguards, including ONA. ONA was designed to unbundle basic services provided by the BOCs to promote efficient and innovative use of the network by ESPs and prevent BOCs from discriminating against independent ESPs in favor of BOC ESP operations. Although various *Computer III* decisions were vacated by the U.S. Court of Appeals for the Ninth Circuit, we subsequently reinstated our ONA requirements -- which were not challenged before the court -- independently of whether we ultimately permit the BOCs to provide enhanced services on an integrated basis.[4]

3. In the *Phase I Order*, the Commission concluded that the provision of unbundled basic service "building blocks" is essential to enable the BOCs' ESP competitors to compete effectively. Therefore, the Commission required the BOCs to file ONA plans describing their specific proposals for initial sets of BSEs: elements of the network that ESPs could use on an unbundled, equal access basis.[5] In the *BOC ONA Order*, the Commission accepted the BOCs' ONA plans in part and rejected them in part, requiring them to make a number of changes and to submit revised plans in May 1989. The Commission also recognized that it would be necessary to revise the Part 69 access charge rules to permit the BOCs to offer ONA services and issued a *Notice of Proposed Rulemaking*.[6] In May 1990, the Commission approved the revised BOC ONA plans.[7]

4. In September 1990, the Commission adopted the *LEC Price Cap Order*.[8] In the *Price Cap* proceeding, the Commission solicited comments on how price cap rules might be applied to ONA, but deferred resolution of that issue to this proceeding. MCI filed a petition for reconsideration of the *LEC Price Cap Order*, arguing that the Commission should revise the test for new services to provide an upper bound for prices. In the *LEC Price Cap Reconsideration Order*,[9] we adopted an interim rule for new service pricing, but deferred permanent resolution of that issue to this proceeding to permit us to consider the new services issue together with pricing issues raised by the *Part 69/ONA Notice*.

III. ISSUES

5. The Commission initiated this *Part 69/ONA* proceeding to consider how best to integrate ONA tariffing policies into the existing federal access charge rules. The *Notice* sought comment on what modifications to the access charge structure were necessary to accommodate the unbundling set forth in the amended BOC ONA plans. The Commission tentatively concluded that the BOCs should offer BSEs as unbundled rate subelements within the existing access elements. The Commission tentatively concluded that it was unnecessary to make major modifications to our existing access rules to implement unbundling, but that some modifications to the local switching element were necessary, since many BSEs are switch-related. The *Notice* also requested comment on any other access elements that might be affected.

6. The *Notice* also tentatively decided to grant the BOCs flexibility in pricing unbundled BSEs within the local switching element, subject to the *Notice* expressed some concern about BOC incentives to price BSEs in a way that discriminates in favor of the BOC ESPs and against ESP competitors. Therefore, the Commission sought comment on the extent and manner in which BOC flexibility should be constrained. The *Notice* also proposed to extend the pricing rules adopted for BSEs to other non-ONA rate subelements that the Commission either requires or permits LECs to offer on an unbundled basis. To maintain a measure of stability in this time of rapid change, the Commission also tentatively concluded that the current ESP exemption should be retained in its current form. Nevertheless, the *Notice* invited comments on two alternatives to the exemption.

A. Unbundling of Basic Service Elements

7. We conclude that, to permit the unbundled offerings of BSEs, we must amend not only the local switching rules, but also the rules for transport and information. In addition, we adopt the approach of the *Notice*, that the unbundled BSEs and BSA elements should replace the

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[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration vacated sub nom.* California v. FCC,905 F. 2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 881364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*) , *Phase II Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir. filed May 13, 1988).

[4] Computer III Remand Proceedings, Report and Order, CC Docket No. 90368, 5 FCC Rcd 7719 (1990).

[5] We are using the term BSE to mean an optional unbundled feature (such as Automatic Number Identification) that an ESP may require or find useful in configuring an enhanced service. *BOC ONA Order*, 4 FCC Rcd at 36.

[6] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, CC Docket No. 89-79, 4 FCC Rcd 3983 (1989) (*Part 69/ONA Notice* or *Notice*).

[7] *BOC ONA Order*, 5 FCC Rcd 3103 (1990). In April 1991, the BOCs filed additional amendments to their ONA plans, and these amendments are now being reviewed.

[8] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*),*modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[9] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

existing feature group offerings, but require that the feature groups continue to be available during a transition period to permit revision of ordering and billing procedures.

8. *Background.* Under the "common ONA model," the BOCs distinguish between basic serving arrangements (BSAs) and BSEs.[10] The common ONA model is based upon the architecture of the existing BOC local distribution networks, from which unbundled BSEs may be offered to the public. BSAs are the underlying switching and transmission services, for example, trunkside switched access. BSEs are optional unbundled features, for example, Automatic Number Identification (ANI). BSEs are generally software-based features and functions resident in the stored-program-controlled switch located in the carrier's central office. A customer must purchase a BSA to gain access to a BSE. The switched service BSA is essentially a combination of the existing common line, local switching, and transport elements that does not include existing features offered as BSEs.

1. The Scope of Unbundling

9. *Proposal.* In the *Notice*, we tentatively concluded that "the BOCs should offer BSEs as unbundled rate subelements within our existing access elements."[11] Because BSEs, for the most part, appeared to be part of the local switching function, we concluded that it would be necessary to amend our local switching rules to permit BSE unbundling. We noted, however, that our current special access rules already permit such unbundling and, thus, appear to need no modification to accommodate ONA. We also asked for comment on whether any other access elements needed to be unbundled to accommodate multiplexing or packet switching.[12]

10. *Comments.* No party disagrees with the conclusion in the *Notice* that we need to modify the local switching rules to accommodate the unbundled BSEs. In addition, all of the parties commenting on the special access rules agree that no changes to those rules are necessary.[13] Three BOCs contend further that no rule changes are necessary to accommodate multiplexing and packet switching.[14] BellSouth argues that the existing local transport waiver provides the necessary flexibility with respect to local transport,[15] and GTE suggests that we should amend our rules in this proceeding to give LECs the flexibility provided by the current transport waiver.[16] SW Bell, however, states that two of its approved BSEs require that our transport rules be revised,[17] while GTE states that we must revise our rules for the information element to accommodate some BSEs.[18] USTA and four BOCs argue that we should amend all switched access rules to permit unbundling in all categories, and not just local switching, without the need for waivers.[19] MCI objects, contending that there is a need for on-the-record waiver proceedings, and disputing that any significant delay would be likely.[20]

11. *Decision.* We conclude that we should modify our local switching, transport, and information rules to reflect our decision to require BOCs and permit other rate-of-return and price cap LECs to offer unbundled ONA services. Our special access rules require no modification, and we conclude that no additional rule changes are necessary to accommodate multiplexing and packet switching. The Commission proposed to adopt whatever rule changes are necessary to permit the BOCs to offer all of the BSEs that they have set forth in the ONA plans, as amended. At the outset, it appears that there will only be a few subelements outside of local switching, in local transport and perhaps information.[21] In this order we adopt the changes to our access charge rules required for the BOCs to tariff BSEs listed in the BOCs' approved ONA plans.[22]

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[10] *BOC ONA Order*, 4 FCC Rcd at 36 paras. 56-57 (1988). *See also*, Bell Operating Companies, ONA Special Report #5, Issue 2, ONA Services Cross Reference Guide (July 31, 1990) (*Special Report #5*).

[11] *Notice*, at 3983 para. 1.

[12] Multiplexing is the process of combining multiple individual communications between two locations over a single channel by dividing the channel, for instance, into distinctly allocable time segments (time division multiplexing) or frequency bands (frequency division multiplexing). Packet switching is the process of packaging data "messages" in labeled standard length "packets" and then individually routing those packets, often over different routes, to their common destination, where the packets are sorted and reassembled into their original messages. Packet switching can be more efficient than circuit switching because it does not use or reserve any connection during the idle states between bursts of data communication.

[13] Ameritech Comments at 4; Ameritech States Comments at 4; Bell Atlantic Comments at 3 n. 5; BellSouth Comments at 5-6; GTE Comments at 12; NYNEX Comments at 2, 8.

[14] Ameritech Comments at 4; BellSouth Comments at 6-7; US West Comments at 10 n. 23.

[15] BellSouth Comments at 6-7.

[16] GTE Comments at 10-11.

[17] SW Bell Comments at Exhibit A, indicating that its Alternate Routing and its Expedited Testing BSEs involve transport as well as local switching elements.

[18] GTE Comments at 10-11.

[19] Ameritech Comments at 5; BellSouth Comments at 7-8; NYNEX Comments at 2, 7, 22; SW Bell Comments at 7, 26; USTA Comments at 8 n. 11.

[20] MCI Reply at 2-6.

[21] The transport elements are, of course, currently subject to a waiver that affords exchange carriers considerable flexibility in establishing rate structures within the broader transport category. American Telephone and Telegraph Company, Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.111 and 69.112 of the Commission's Rules and Regulations, 94 FCC 2d 545 (1983); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 97 FCC 2d 834,862 para. 88 (1984); MTS and WATS Market Structure, CC Docket 78-72, 58 RR 2d 917 (1985); Annual 1988 Access Tariff Filing Petitions for Waiver, 2 FCC Rcd 5659, 5660 (1987). This Order modifies that waiver to the extent necessary to enable the unbundled offering of any BSEs that fit within the broader transport category. The pricing of transport BSEs and BSA elements must comply with the pricing requirements described in this order. Although we are adopting amended language for the waived Common Transport and Dedicated Transport rules, we are not requiring implementation of those rules at this time. That question will be resolved in another proceeding.

[22] Various states argue that the Commission should not require BSA/BSEs to be federally tariffed. DC Comments at 1, 2; Florida Comments at 3-4; Iowa Comments at 3; Maryland Comments at 1; NARUC Comments at 1; New Jersey Reply at 2; New York Comments at 4, 7-10; SW Bell Regulators Reply at 4-5; Virginia Comments at 1. In the *BOC ONA Reconsideration Order* we

2. BSAs and the Unbundling of Existing Feature Groups

12. *Proposal/Comments.* Local exchange access tariffs use the term feature groups to describe the packages of interstate access that are available. These packages currently include various non-chargeable optional features. For example, Feature Group D provides the customer with a trunkside access connection and all equal access features. The *Notice* and *BOC ONA Order* presumed that we could classify existing interstate feature groups as BSAs, and the *Notice* sought comment on that position.[23] The LECs strongly support this proposal as logical and appropriate,[24] as do the Ameritech States.[25] The ESPs, on the other hand, oppose treating existing interstate access arrangements as BSAs,[26] in apparent preference for a BSA designed especially for them.[27] Some LECs oppose the concept of unbundling existing feature groups at all, at least until concrete demand for unbundled BSEs develops. Thus, NYNEX, SW Bell and US West oppose unbundling as a costly, premature, and unnecessary exercise.[28] They argue that the Commission should permit, but not require, that new BSEs be offered on an unbundled basis.

13. *Decision.* We will follow the direction indicated in our *BOC ONA Order* and the *Notice* for our treatment of BSAs. Each BOC must offer one lineside switched access BSA and one trunkside switched access BSA. Each switched access BSA will include the portions of local switching, local transport, and common line that are not unbundled. The switched access BSAs will then serve as the basic platforms upon which all switched access customers will build, adding BSEs to create the packages they desire.

14. It is likely that the BSEs offered initially by LECs will be BSEs set forth in one of the approved BOC ONA plans, and we amend our rules to permit LECs to offer these BSEs. However, for BSEs not previously approved by the Commission, we will require LECs to file a description of the BSE with the Common Carrier Bureau. To facilitate the introduction of new BSEs desired by ESPs, we now establish an expedited BSE approval process. Within 45 days after a description of a BSE is filed, the Bureau may request that the carrier file additional information, which may include a petition for waiver of the Part 69 rules. If the Bureau takes no action within 45 days, the BSE will be deemed approved. However, as is the case today, LECs that wish to create an additional switched access BSA, or implement an "unbundling" of the local switching, transport, or information elements other than an unbundling of a BSE will have to obtain a Part 69 waiver.[29] We limit the waiver requirement to switched access elements because our current special access rules permit carriers to offer new special access services without waivers. We believe that our decision with respect to the necessity of waivers for new BSEs and BSAs strikes a reasonable balance between permitting LECs to offer new services useful to ESPs in a timely fashion and controlling the LECs' ability to make fundamental and possibly discriminatory rate structure changes.

15. We reiterate that our ONA policy is more than an effort to permit BOCs to offer unbundled new services. Rather, the vision of ONA and the future of the network, which we adopted in our *ONA Order,* requires that BOCs unbundle BSEs from existing access arrangements,[30] as well as continuing to explore ways of offering new BSEs. We discuss the ESPs' request for a separate BSA in section III. C., below.

3. Retaining or Abolishing Existing Feature Groups

16. *Proposal.* The *Notice* contemplated that the existing feature group packages would no longer exist. The *Notice* stated: "[u]nder the unbundling we propose, bundled Feature Groups (FGs), such as a 'bundled' form of FGD including ANI capability would no longer be available."[31] Access buyers would no longer purchase a bundled package of BSA/BSEs, but rather would have the option of ordering the same group of features they had ordered with the feature groups, or picking only the optional features they wanted and paying only for the BSA and those features.

17. *Comments.* MCI, Sprint, and some of the BOCs oppose the abolition of feature groups. Interexchange carriers express concern about the cost of adjusting their ordering and billing systems to handle unbundled elements.[32] MCI is also concerned that the replacement of feature groups may serve to disadvantage MCI relative to AT&T and the BOCs (for interexchange intra-LATA traffic) by altering the relative prices that each would pay for the combination of services it will purchase.[33] GTE complains that the elimination of feature groups would hamper its marketing efforts.[34]

18. MCI urges that, if this Commission mandates unbundling, we also require the bundled feature groups to be maintained for IXCs.[35] A number of OCs argue that retaining the feature groups alongside the unbundled BSA/BSEs would create an "arbitrage" or "adverse selec-

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affirmed our decision to require federal tariffing of interstate BSEs. 5 FCC Rcd at 3088-90 (1990). We decline to revisit that issue in this proceeding as we see no new arguments raised.

[23] *Notice* at 3984 para. 11. For example, there would be a lineside circuit switched BSA (currently FGA), and a dedicated voice grade BSA (currently voice grade special access).

[24] Bell Atlantic Comments at 3 n. 4; BellSouth Comments at 4-5; Contel Comments at 2; GTE Comments at 4; NYNEX Comments at 9; SW Bell Comments at 56; USTA Comments at 4; US West Comments at 8-9.

[25] Ameritech States Comments at 4.

[26] CBEMA Comments at 2-5; Dialcom Comments at 24; ICA Comments at 3-4; Joint Parties Comments at 16-17; McGraw-Hill Reply at 12; Prodigy Comments at 15-16; Telenet Comments at 19-21, 40-41; Tymnet Comments at 8, 30-32.

[27] CONAP Comments at 3-6; ICA Comments at 7-8; Joint Parties Comments at 16-18.

[28] NYNEX Comments at 9-12, Reply at 2-4; SW Bell Reply at 3-4; US West Comments at 4-9, Reply at 2-3.

[29] Several BOCs have included previously untariffed Dedicated Network Access Links (DNALs) as BSAs in their ONA Plans and have sought to offer DNALs as part of their Signaling System 7 interstate tariffs. These offerings appear to require Part 69 waivers.

[30] *ONA Order,* 4 FCC Rcd at 145 para. 279.

[31] Notice at 3991 n. 9.

[32] MCI Comments at 34-37; ICTC Comments at 9. See also AT&T Comments at 9-12.

[33] MCI Comments at 36.

[34] GTE Comments at 4 n. 4.

[35] MCI Comments at 34-36.

tion" problem.[36] BellSouth suggests that a dual system might be workable on a temporary basis.[37] MCI also stated that it might find the unbundling and abolition of Feature Group D acceptable after the appropriate costing principles are established and the Commission and industry have experience working with them.[38] In *ex parte* discussions, AT&T, which opposed abolition of the feature groups in its written comments, changed its position to support unbundling, provided that carriers are given sufficient time to adopt new ordering and billing processes.[39]

19. *Decision.* ONA is designed to produce "building block" services, which all customers can use as components of the services they provide.[40] ONA is an extension of the fundamental principle enunciated in the *Access Charge Proceeding*[41] that access to the network is available on the same terms to all, based on the use made of the network rather than the identity of the user. We believe that this approach will foster efficient and innovative usage of the network. Moreover, we believe that the unbundling required by the *ONA Order*, and reaffirmed today, will help lay the groundwork for more fundamental unbundling. [42]

20. The fundamental principles of ONA and access argue for requiring the BOCs to replace existing feature groups with unbundled services. However, immediate abolition of the feature groups would appear to be unreasonably disruptive to IXCs, which currently purchase the vast majority of access. Providing a transition period will provide adequate time for IXCs to implement billing and ordering changes before the feature groups are abolished. This transition period will expire at the time the initial ONA services are included under price caps.[43] During this transition period, the BOCs will offer existing feature groups as an option and will also offer BSEs and a combination of residual elements as BSAs. This transition period should be sufficiently long to give IXCs time to develop and implement adjustments to their ordering and billing systems, and sufficiently short so that it does not raise serious adverse selection problems.

B. Rate Level Constraints

21. In this section, we conclude that ONA services, like most other LEC interstate services, should be regulated under our price cap rules. We also modify the price cap new services test to provide LECs with sufficient flexibility to price efficiently, while protecting against excessive prices and unreasonable discrimination. Finally, we find that additional disclosure requirements are necessary to protect against discrimination with respect to LEC offerings of "new" ONA services.

1. Applying Price Caps to ONA Services

22. *Background/Comments.* The *LEC Price Cap Notice* requested comments on the tentative conclusion that ONA and price caps were compatible,[44] and the *LEC Price Cap Order* deferred the actual decision of whether and how to apply price caps to ONA to this proceeding.[45] Many ESPs express concern that the price cap rules would not sufficiently constrain the LECs' ability to manipulate BSE prices, particularly if the prices initially placed under the caps were not set at reasonable, cost-based levels.[46] A number of ESPs argue that price caps should not be applied to ONA services at all or, at least not for five to ten years. Many ESPs favor more restrictive rules for ONA services. The BOCs and USTA, however, see no incompatibility between price caps and ONA.[47] They argue that the rationale that justified price caps generally also supports the application of price cap regulation to ONA services.

23. *Discussion.* We adopted price caps "to harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and non-discriminatory rates, as well as a communications system that offers innovative, high quality services."[48] We believe that price cap regulation can provide the same public interest benefits for ONA services that it provides for other services, and that we can address the concerns raised by ESPs through the application of the pricing rules discussed below.

2. Initial Rate Levels

24. *Background.* The price cap rules establish special justification requirements for "new services."[49] In the *LEC Price Cap Order*, we established a net revenue showing for new services.[50] In our *LEC Price Cap Reconsideration* order we decided, as an interim measure pending comple-

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[36] BellSouth Reply at 11-13; SW Bell Reply at 4. In theory, the problem arises from the opportunity that customers would have to choose from two different prices for the same access services: a bundled package rate or an unbundled set of rates. The BOCs argue that, under this scenario, because the price for the feature group is based on averages for calls per month and minutes per call, they would experience a revenue shortfall unless they were permitted to increase the feature group rates as those with below average usage select the unbundled option.

[37] BellSouth Reply at 11-13.

[38] MCI Comments at 36.

[39] AT&T *ex parte* filing, Feb. 28, 1991.

[40] *BOC ONA Order*, 4 FCC Rcd at 42-43 paras. 70-72.

[41] MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682,711 (1983).

[42] *See also*, Expanded Interconnection with Local Telephone Company Facilities, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd _____, CC Docket No. 91-141, FCC 91-159, adopted May 9, 1991.

[43] If the BOC tariffs are submitted on Nov. 1, 1991 and go into effect 90 days later, the rates in those tariffs will be placed under price caps in July 1993, the effective date of the first annual filing after the required historical data have been accumulated.

[44] *Price Cap Notice*, 4 FCC Rcd 2873, 3286-87 paras. 864-65 (1989).

[45] 5 FCC Rcd at 6835 para. 395.

[46] API Comments at 6-7; CompuServe Reply at 22-24; CONAP Comments at 4749; ETI Study at 55-57; ICA Comments at 6-7; IDCMA Comments at 4; Joint Parties Comments at 25; NDC Reply at 12; ONA Users Comments at 34-35; Telenet Reply at 29-30.

[47] Ameritech Reply at 15-19; Bell Atlantic Reply at 7-8; BellSouth Reply at 32-34; SW Bell Reply at 15-19; USTA Reply at 15-16.

[48] *LEC Price Cap Order*, 5 FCC Rcd at 6787 para 2.

[49] The *LEC Price Cap Order* defines new services as services that add to the range of options already available to customers. A new service may, but need not, include a new technology or functional capability. 5 FCC Rcd at 6824 para. 314.

[50] *LEC Price Cap Order*, 5 FCC Rcd at 6825 paras. 319-321.

tion of this proceeding, to retain our traditional, pre-cap cost showing for new services, in addition to the net revenue showing.[51]

25. Under our traditional cost support showing, LECs submit engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs incurred. Then the overall cost is computed by adding overhead costs.[52] Because the existing feature groups will remain available as an option for some time after the introduction of the unbundled BSEs and the BSA elements, the price cap rules classify BSEs and the BSA elements as "new services" for purposes of the price cap rules.

26. The *Part 69/ONA Notice* sought comment on approaches to the pricing of BSE subelements, seeking to give BOCs some flexibility in pricing BSEs while adequately addressing the potential for excessively high, unjustifiably low, and unreasonably discriminatory prices.[53] Because the *Notice* in this proceeding was issued before the *LEC Price Cap Order* was adopted, the *Notice* was couched chiefly in terms of a rate-of-return environment. Nevertheless, the pricing approaches proposed, which range from substantial pricing flexibility to significant constraints on pricing, are representative of the range of choices that can be implemented in a price cap as well as a rate-ofreturn regime. The *Notice* stated that, should a price cap form of regulation be adopted, the pricing of ONA access elements could be modified to harmonize with price cap constraints.[54]

27. *Proposal.* The *Notice* in CC Docket No. 89-79 observed that "in many cases, BSEs will involve relatively minor costs per individual feature" and tentatively concluded that the Commission should permit a flexible approach to the pricing of BSE subelements. However, the *Notice* acknowledged the desirability of some limitation on this flexibility. Specifically, the *Notice* tentatively concluded that constraints should be imposed on "[1] uneconomically high rates, which may stifle development of new enhanced services, [and] [2]... unjustifiably low rates, which may cause 'basic switching' customers to subsidize ONA services." The Commission also sought to limit "the potential for possible discriminatory pricing of services that the BOCs' enhanced service competitors may use."

28. The *Notice* offered four proposals: Option one, the maximum flexibility alternative, proposed to adhere solely to overall element-level constraints, otherwise permitting discretion over the pricing of individual BSE subelements. Option two involved the imposition of rules analogous to those developed in the *Strategic Pricing Guidelines Order* [55] for special access, including the use of "cross-over" points to check prices. Options three and four represented variations of a cost-based approach. Option three suggested the use of a costing model, and offered the Bellcore Switching Cost Information System (SCIS) as an example. The *Notice* stated that SCIS, currently used by most BOCs for rate-setting, is capable of setting minimum prices for most local switching BSE-type features, and could be used in combination with price ceilings from other sources. The *Notice* discussed the possibility of using a single, industry-wide model or multiple, individually selected models. Option four proposed requiring BOCs to apply fully distributed cost (FDC) principles to all BSE rate subelements individually. Finally, the *Notice* proposed to apply the ONA pricing rules we adopted in this proceeding to non-ONA services that LECs may offer in the future as separate subelements in their access tariffs.[56]

29. In the *LEC Price Cap Reconsideration Order*, we adopted an interim rule for new services, but concluded that the issues raised on reconsideration overlapped substantially with the pricing issues raised by the *Part 69/ONA Notice*. Therefore, we deferred final resolution of the issue of new service pricing to this proceeding, and consolidated the records.

30. *Comments.* The BOCs and other LECs strongly support maximum flexibility (*Notice* option 1).[57] They argue that they need such discretion to price more efficiently. They seek the flexibility of a competitive market to enable them to introduce new BSEs at incremental cost, and to minimize differences between state and federal tariffs (and thus to discourage tariff shopping). Further, they claim that the combination of: 1) price parity, whereby LECs pay the same price for the same access services they provide to others;[58] 2) the BOCs' incentive to stimulate demand; and 3) the tariff review process, will serve to discourage them from unreasonably discriminating against ESP competitors. Non-BOC LECs say that maximum flexibility is essential to their participation in ONA.[59] The Ameritech States and Virginia support this option.[60]

31. Almost all ESPs and users oppose maximum flexibility, arguing that it would permit the LECs to discriminate unlawfully.[61] ESPs express concern that BOCs might set their federal rates for BSEs at levels comparable to the contributory levels that might be used in the states to extract monopoly profits. ESPs and other users do not believe that either price parity or the desire

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[51] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2694-95 para. 126 (1991).

[52] *Id.* at para. 127.

[53] *Notice* at 3985 paras. 16-18.

[54] *Notice* at 3992 n. 45.

[55] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, FCC 88-321, 4 FCC Rcd 4797 (1988).

[56] *Notice* at 3986 para. 26. The *Notice* listed 800 access and 900 access elements as examples of non-ONA services. *Id.* at 3992 n. 59.

[57] Alltel Comments at 4; Ameritech Comments at 11; Bell Atlantic Comments at 4-5; BellSouth Comments at 9-11; Contel Comments at 5-6, 10; GTE Reply at 18-19; ICTC Comments at 4-6; NECA Comments at 3; NYNEX Comments at 13-17; Pacific Comments at 4-7; SW Bell Comments at 4-15; United Comments at 2-5; USTA Comments at 9-12; US West Comments at 12-14, 21-22.

[58] *BOC ONA Order*, 4 FCC Rcd at 177 para. 338.

[59] USTA Comments at 1-11; Continental Comments at 2,4,6,10; ICTC Comments at 4-6; NECA Comments at 3; NTCA Reply at 2-4.

[60] Ameritech States Comments at 5; Virginia Comments at 4.

[61] ADAPSO Comments at 45-47; API Comments at 4; AT&T Comments at 4; CompuServe Comments at 35-37; CONAP Comments at 42-43; EMA Comments at 20; Joint Parties 22-24; McGraw-Hill Reply at 14; MCI Comments at 33; NDC Reply at 11; ONA Users' Reply at 22-24; Telenet Comments at 52; Tymnet Comments at 34.

to increase demand for services will prevent BOCs from employing discriminatory pricing. ESPs and others contend that the tariff review process cannot be very effective if those expected to review prices have no access to adequate cost data. Several state commissions and NTIA also oppose maximum flexibility.[62] SW Bell Regulators, Florida, and Maryland argue that this option will permit federal rates for BSEs to be set too low, thereby undermining state policies.[63]

32. Only four parties express any support for rules like the special access strategic pricing guidelines (*Notice* option 2).[64] Almost all others argue that the rules, premised on the substitutability of elements, are not appropriate for BSEs, which are rarely reasonable substitutes for each other.

33. BOCs and other LECs express substantial and broad support for the cost model concept (*Notice* option 3), provided that the approach selected gives them sufficient pricing flexibility. ESPs and users favor the cost model for BSE pricing, but propose a different approach for BSA pricing.[65] LECs that do not currently use SCIS contend that it would be very expensive to secure access to it, that SCIS would require repeated and burdensome revisions with the introduction of each new BSE, and that SCIS was designed for the major switching systems, not for the older network switches that many smaller LECs still employ. Commenters also state that SCIS is only useful for local switching BSEs and that the proprietary nature of the model itself, as well as the switch cost data used, raises questions regarding proper evaluation. A number of ESPs request more information on SCIS.[66]

34. In *ex parte* filings, some ESPs and AT&T have proposed that LECs supplement the cost model with certain cost data in their ONA filings. The ESPs propose a detailed tariff review plan (TRP)-like form, while AT&T requests that the BOCs be required to file certain specific direct (cost/investment and direct cost/price ratios.[67] MCI, Telenet, and Tymnet all propose that, since BSE costs are all likely to be small and difficult to determine, BSEs should all be set at "equal levels," thereby eliminating the cost of individualized determination and eliminating any opportunity for discrimination, and CONAP agrees with those latter commenters, assuming that BSE cost differences are small.[68]

35. ESPs cite their fear about BOC discrimination in supporting the more restrictive FDC variation (*Notice* option 4).[69] The option is strongly opposed by the LECs, which complain that it will be unnecessarily burdensome and expensive to implement and will yield arbitrary and uneconomical rates by denying them any real pricing discretion.[70] NTIA and the DC PSC also see serious drawbacks to this approach.[71]

36. In addition, a few parties suggest their own variations of the FDC option: NTIA would allocate all indirect costs to the BSAs, leaving the BSEs priced at incremental direct cost, while AT&T would assign joint and common costs according to a uniform loading factor.[72] ESPs offer several methods to develop special rates for a new BSA for ESPs, an option discussed in section III. C., below. Finally, a majority of commenters support applying the pricing rules developed for BSEs to non-ONA services as well.[73]

37. In its petition for reconsideration of the *LEC Price Cap Order*, MCI argues that the price cap rules that existed prior to the adoption of the interim services test fail to address the potential for unreasonably high pricing of "new" services. MCI then requests that the Commission limit "new" service rates so that LECs do not earn more than the authorized rate of return applicable for rate-of-return carriers on each new service.[74] MCI says BOCs could reprice "new" versions of existing capped services to evade the cap. LECs respond that LEC pricing would be constrained by the ability of customers to select the existing version of the service at the capped price.[75] LECs also argue that quarterly reporting and other requirements placed on new filings serve to ensure the reasonableness of new service prices.[76] MCI replies that a LEC could diminish the substitutability of the existing version of the

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[62] See, DC Comments at 4; NARUC Reply at 2-5; NTIA Comments at 6-7; SW Bell Regulators Reply at 7-8.

[63] Florida Comments at 4; Maryland Comments at 2; SW Bell Regulators Comments at 5.

[64] Allnet Comments at 4; Ameritech Comments at 9-10; Ameritech States Comments at 5; GTE Comments at 8-9.

[65] ADAPSO Comments at 46-47; API Comments at 5; Bell Atlantic Comments at 7-8; CONAP Comments at 46; ETI Report at 54-55; GTE Comments at 15; ONA Users Comments at 33-34; Pacific Comments at 7-8; SW Bell Comments at 18-21; Telenet Comments at 53; Tymnet Comments at 8, 35; United Comments at 4 n. 5; USTA Comments at 16-17; US West Comments at 18-19.

[66] ADAPSO Comments at 46-47; CONAP Comments at 46-47; EMA Comments at 20-21; McGraw-Hill Reply at 15-16; ONA Users' Comments at 33-34; Telenet Comments at 53; Tymnet Comments at 35.

[67] See, Joint *ex parte* filings by ADAPSO, Bankers, ONA Users, Prodigy, Tymnet (BT North America), et al., Jan. 18, 1991 and May 8, 1991; AT&T *ex parte* filing, Jan. 29, 1991 proposing that in addition to specifying the unit investment for each BSE, that LECs also provide figures for direct unit cost, unit FDC, and rate, as well as the ratio of each of these three to the unit investment figure.

[68] MCI Comments at 29-34; Telenet Comments at 54; Tymnet Comments at 3334; CONAP Reply at 23

[69] ADAPSO Comments at 46; CONAP Comments at 46; EMA Comments at 21-22; ETI Report at 53-54; NDC Reply at 12; ONA Users Comments at 32-33; Tymnet Comments at 35.

[70] Bell Atlantic Comments at 8-10; BellSouth Comments at 13-15; Contel Comments at 8; GTE Comments at 14-16; NYNEX Comments at 18-20; Pacific Comments at 8-11; SW Bell Comments at 22-24; United Comments at 4; USTA Comments at 18; US West Comments at 19-21.

[71] DC Comments at 5; NTIA Comments at 8.

[72] NTIA Comments at 2-5; AT&T Comments at 7-9.

[73] Ameritech Comments at 14; Ameritech States Comments at 7-8; Bell Atlantic Comments at 11; BellSouth Comments at 7-8, 16-17; Contel Comments at 6; NYNEX Comments at 21-22; Pacific Comments at 11-12; SW Bell Comments at 26; USTA Comments at 5; US West Comments at 22-3. NYNEX and Pacific conditioned their support on our approval of their preferred pricing rules, NYNEX Comments at 21-22; Pacific Comments at 11-12. But see CONAP Reply at 40-42; MCI Reply at 3-5; Virginia Comments at 5, expressing concern that, due to the unpredictable nature of future services, this policy would shift the burden of proof away from carriers.

[74] MCI Recon. Petition at 36-38; MCI Recon. Reply at 47-48.

[75] USTA Opposition at 22; BellSouth Opposition at 19; Pactel Opposition at 19.

[76] Ameritech *ex parte* filing, May 13, 1991; BellSouth Opposi-

service by reducing the quality of that service while enhancing the technological capabilities of the new service.[77] A number of LECs also complained that an upper bound on new service prices would inhibit innovation.[78] NYNEX states that it would not object to a cap on new services, if the cap permitted LECs to secure a reasonable return on total investment and recognized the higher risk associated with revenue producing investments.[79]

38. *Decision.* Commenters identify a number of competing interests in selecting a pricing standard. Certainly, we want LECs to have the flexibility to price efficiently and the incentive to innovate. However, we also want to prevent LECs from setting excessively high rates and to protect against unreasonably discriminatory pricing. As discussed below, the option that appears to meet these goals best is a flexible cost-based approach to pricing new services.

39. Although the price cap system has rules designed to ensure that the adjustments of existing prices will be reasonable, prior to the adoption of the interim new services test, it did not provide any specific tariff review showing to ensure that initial prices for "new" services were not unreasonably high. A net revenue test provides assurance that the initial price will not be set at a predatory level, but does not ensure that the initial rate will not be excessive. While no ceiling would be required in a competitive market, in a market where a single firm has monopoly control, a price set initially at an excessive level may remain free from significant competitive pressures indefinitely. Providing LECs with maximum flexibility by requiring only a net revenue showing would rely on the sharing mechanism of price caps to control excessive rates. We reject that approach as inadequate, for while sharing may diminish the impact of excessive prices, it was not designed nor does it serve to eliminate the incentive for, or impact of, sustained monopoly pricing of an individual new offering.

40. Given the need for some form of price constraints, we next tried to identify a "non-cost-based" constraint. Commenters almost unanimously oppose the strategic pricing guidelines option in the Notice, and the record does not reveal any other adequate non-cost-based constraints. We conclude, therefore, that our new services test must be cost-based. The question, then, focuses on whether to require fully distributed cost support or a more flexible approach.

41. Because we believe that the public interest will be served by providing LECs with an adequate incentive to innovate, we conclude that a flexible cost-based approach is the best way of controlling both excessive pricing and discrimination. As NYNEX recognizes, a cost-based upper bound can preserve carriers' incentives to innovate, if it permits them to earn a return on their total new investment commensurate with the risk they assume.

42. Under our approach, a LEC introducing new services will be required to submit its engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs of providing the new service, absent overheads, and must also satisfy the net revenue test. LECs may develop their own costing methodologies, but they must use the same costing methodology for all related services. For example, the same methodology must be used for all BSEs unbundled from local switching. Regardless of the cost methodology selected by the carrier, cost support submitted with the tariff must consist of the following information: (1) a study containing a projection of costs for a representative 12-month period; (2) estimates of the effect of the new service on traffic and revenues, including the traffic and revenues of other services; and (3) supporting workpapers for estimates of costs, traffic, and revenues.

43. In addition, local exchange price cap carriers will be permitted to include, as part of their justification for the prices they select, an analysis of any risk premium they believe they need to supplement their rate of return for the particular new service. Thus, LECs will have the opportunity to justify a higher price for a new service if they can show that they are undertaking a particularly risky venture, which would not be economically practical absent the risk premium they requested. Any LEC seeking a risk premium pursuant to this paragraph shall include an explanation of the methodology employed to calculate the premium and the projected overall return for the service. To satisfy their burden of proof, carriers must provide evidence of comparably risky undertakings by firms in relevant industries, together with the cost of capital associated with the undertakings. We will evaluate these showings on a case-by-case basis. LECs should also include an on-the-record showing of the following information: (1) research and development expense and investment for the new venture; (2) marketing expense; (3) the type and functions of any new technologies employed; (4) an explanation of the method by which projected demand has been derived; and (5) any special elements of risk.[80]

44. Once the direct costs have been identified, LECs will add an appropriate level of overhead costs to derive the overall price of the new service. To provide the flexibility needed to achieve efficient pricing, we are not mandating uniform loading, but BOCs will be expected to justify the loading methodology they select as well as any deviations from it. We will evaluate the reasonableness of the manner in which overhead costs are loaded onto the cost of the service, including review of the ratios of direct unit cost to unit investment and direct unit cost to unit price. Therefore, we require the BOCs to include these ratios in their tariff filings.[81]

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tion at 19; BellSouth *ex parte* filing, May 15, 1991; NYNEX Opposition at 14; SW Bell Opposition at 12-13; SW Bell *ex parte* filing, May 6, 1991; USTA Opposition at 22.

[77] MCI Recon. Reply at 44-45.

[78] Bell Atlantic *ex parte* filing, Jun. 5, 1991; SW Bell *ex parte* filing, May 14, 1991; USTA *ex parte* May 31, 1991.

[79] NYNEX *ex parte* filing, May 24, 1991. See also GTE *ex parte* filing, Jun. 4, 1991.

[80] We describe more fully in Appendix C the information that LECs are required to include in this on-the-record showing

[81] In the *Part 69/ONA Notice*, we proposed to use the same pricing rules for BSEs and for non-ONA services that LECs may offer in the future as separate subelements in their access tariffs. Our decision on the pricing rule for new services offered by price cap carriers subsumes the issue raised in the *Part 69/ONA Notice*, and we therefore do not address it separately.

45. *BSEs.* The chief concern raised by commenters opposing the regulation of ONA services under price caps is the heightened danger of discriminatory pricing of BSEs by BOCs who will be competing with the customers who purchase BSEs. We agree that ONA services do present an increased danger of unreasonable discrimination, and we feel that the competitive relationship between the BOCs and ESPs justifies an elevated level of control. To address this concern and help ensure that the BOCs are not discriminating between BSEs used primarily by the BOCs and those used primarily by ESP competitors, we will require the BOCs to "flag" or identify the BSEs that they intend to use in their enhanced service operations at any time during the period before the BSE is placed under price caps.

46. Because this flagging requirement applies to initial prices, BOCs necessarily will be required to predict which BSEs their enhanced service operations will use. We expect, however, that at least some of these predictions will be based on historical demand, as many of the features that will be provided as BSEs are now available as non-chargeable options. We believe that this flagging, in conjunction with our cost-based pricing rules, will assist in forestalling discrimination. For example, if the price of BSEs used primarily by non-BOC ESPs reflects a much higher proportion of overhead loading than the proportion of loading for BSEs used primarily by BOC ESPs, we would regard this as a sign of possible discrimination.

47. In the future, LECs may unbundle additional BSEs from existing services, and these new BSEs may be considered "restructured" services under price caps. We do not decide today the test that would apply to the initial prices of these "restructured" BSEs, but seek further comment below in a *Supplemental Notice of Proposed Rulemaking.*[82]

48. *BSAs.* When BSEs are established, it will also be necessary to compute a charge for the residual access element that no longer includes the features or functions that are being offered as BSEs. In most cases, local switching will be the only component of access that will need to be repriced, but in some cases the introduction of a BSE will require the repricing of transport or information or special access subelements. The remaining combination of repriced switched or special elements that are not unbundled will be a BSA.[83] We wish to ensure that ONA unbundling does not result in higher rates for existing access customers. Therefore, we will ensure revenue neutrality by imposing a constraint comparable to our restructured services test. For BSEs and BSA elements that represent unbundled versions of existing services, we require LECs subject to price caps to recast base period demand for the bundled offering (*i.e.*, the demand specified in the most recent annual price cap filing). LECs are required to demonstrate that the product of the new rate multiplied by the recast (base period) demand is less than or equal to the product of the existing bundled rate multiplied by the aggregate base period demand.[84]

However, we take this opportunity to clarify our decision in one respect because the comments indicate some confusion. Some carriers expressed an interest in being able to offer new subelements without obtaining a waiver of our Part 69 rate structure rules. Ameritech Comments at 14; BellSouth Comments at 7-8; Contel Comments at 6; NYNEX Comments at 22; PacTel Comments at 11-12; SWBell Comments at 26; USTA Comments at 5. We did not propose to alter the Part 69 rate structure rules for non-ONA services, and we have not done so. Rather, we have revised only the pricing rules that apply to all new services offered by price cap carriers. Therefore, any carrier that wishes to establish a separate rate element for a non-ONA service that conflicts with our Part 69 rules will still be required to obtain a Part 69 waiver.

[82] See paras. 74-75, *infra.*

[83] This will not be the case if the information element is repriced.

[84] The bundled feature group offerings will disappear at the time of the annual access filing in which the unbundled BSE and BSA element rates are placed under caps. To develop base period BSA and BSE demand for that filing, LECs should include both recast base period demand for bundled offerings and the demand for the individual BSEs and BSA elements.

3. BSE Rate Structure

49. *Proposal/Comments.* The *Notice* tentatively concluded that, given the large number of BSEs proposed to be introduced, the Commission should not prescribe a rate structure for each one.[85] We proposed, instead, to require that the rate structure for each BSE reasonably reflect the varying nature of per-minute, per-call, or per-line costs accrued for each BSE. All but one of the parties commenting on this issue support the Commission's tentative conclusion and reasoning.[86] The lone dissenter, Alltel, requests that the Commission press all of the BOCs to employ the same rate structure for a given element.[87] Ameritech argues that the Commission should not require a uniform rate structure because such a requirement would force additional tariff filing requirements on LECs that are not required to implement ONA and would ignore the non-homogeneous, non-ubiquitous nature of the industry.[88] Some ESPs advocate flat rate BSE prices, observing that for many of the low priced BSEs, the administrative cost of metering makes it uneconomical to do so, even when the BSE cost is traffic sensitive.[89] GTE and US West argue that usage-sensitive prices for BSEs with usage-sensitive costs are more economically efficient than flat rates.[90] Finally, two user groups propose that the Commission require the BOCs to offer four-part tariffs for each BSE.[91] Each would be available on either a usage basis or at a flat rate (based on average usage) and on either a bill-to-caller or bill-to-called party basis. Ameritech argues that the flat rate option is not cost causative.[92]

50. *Decision.* Economically efficient prices reflect the manner in which costs are incurred. We therefore adopt the tentative conclusions of the *Notice* and require that BSE rate structures reasonably reflect the nature of the underlying costs. We believe that this decision, without additional requirements, will produce considerable uniformity in BSE rate structures among the BOCs. In addition, the Federal-State ONA Joint Conference is addressing the issue of BSE uniformity. Therefore, we believe that prescribing a rate structure for each BSE is unnecessary, and we forgo the mandated uniformity proposed by Alltel. If our rule does not produce substantial uniformity, and if any lack of uniformity creates difficulties for customers, or in the tariff review process, we can revisit this issue at a later date.

4. Adjusting Rate Levels Under Price Caps

51. *Background/Comments.* Absent any modifications to the current price cap rules, BOC ONA service rates will be subject to the same price cap formula as other BOC rates, including applicable basket and band limitations. ESPs generally advocate excluding ONA services from price caps,[93] although two ESPs propose that, if price caps are applied, each individual BSE be banded.[94] The BOCs and USTA support the current rules with no modifications.[95] In the *LEC Price Cap* proceeding, the IXCs and NARUC favor additional separate banded service categories for new and restructured BSE services;[96] Iowa and Michigan advocate the creation of new service categories for new BSEs,[97] while Ohio suggests including ONA elements in the local switching service category.[98] Ad Hoc proposes the establishment of separate baskets for transport and switching BSEs.[99] In *ex parte* filings, SW Bell proposes to flag the BSEs that it used[100] and Bell Atlantic agrees that requiring each BOC to report the percentage of total usage that its own use of each BSE represents would be a reasonable procedure.[101]

52. *Decision.* As we have discussed above, there is a greater risk of price discrimination in the context of ONA than for basic services generally, given that the BOCs may compete with their ESP customers. As discussed in Section III. B. 1., we seek to adopt pricing rules that constrain the BOCs' ability to discriminate without unduly limiting their ability to price efficiently. Because we expect the price of each of the currently proposed BSEs to be very small relative to the price of the access elements, for which we have created service categories, we decline at this time to increase the number of baskets and service categories established in the *LEC Price Cap Order.* We conclude that banding each BSE would not produce sufficient benefits to justify the administrative costs and loss in pricing efficiency. In addition, the creation of a special BSE service category for banding purposes would do little to prevent LECs from discriminating against independent ESPs, because LECs would still be able to raise one set of BSE rates (those used primarily by others) and decrease another set of BSE rates (those used primarily by themselves). Instead, we believe that the disclosure requirements discussed below will be adequate to deal with this concern. We will, however, monitor changes in BSE prices and create additional service categories, if conditions appear to warrant such a step.

53. At this time, we adopt disclosure requirements that should constrain the potential for discrimination by price cap LECs while permitting efficient pricing. We direct that, in their annual price cap filings, in addition to reporting total historical demand for each BSE in the base year, price cap LECs must also indicate the percentage of that total demand represented by their own enhanced services operations. The data necessary to calculate

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85 *Notice* at 3986 para. 25.

86 AT&T Comments at 9-10 n. **; Ameritech Comments at 13; Ameritech States Comments at 5; Bell Atlantic Comments at 10; BellSouth Comments at 15; GTE Comments at 16-17; NYNEX Comments at 20-21; SW Bell Reply at 11-14; USTA Comments at 19; US West Reply at 7-10.

87 Alltel Comments at 3-5.

88 Ameritech Reply at 18-19.

89 ADAPSO Comments at 47; Tymnet Comments at 33-34. Tymnet suggests that the principal BSE cost may be a software right-to-use fee. *Id.*

90 GTE Reply at 12-15; US West Reply at 10.

91 CONAP Comments at 37; ONA Users Comments at 31.

92 Ameritech Reply at 25-26.

93 CompuServe Reply at 22-24; CONAP Comments at 47-49; ETI Study at 5557; ICA Comments at 6-7; IDCMA Comments at 4; Joint Parties Comments at 25; NDC Reply at 12; ONA Users Comments at 34-35.

94 API Comments at 6-7; Telenet Reply at 29-30.

95 Bell Atlantic Reply at 7; BellSouth Reply at 32-34; SW Bell Reply at 11-19; USTA Reply at 15-16.

96 AT&T LECPC at 27 n. *; MCI LECPC at 59-60. Ad Hoc and ICA LECPC reply comments generally support these proposals. See also TCA LECPC reply at 12 and n. 25; Colorado LECPC reply at 11; IDCMA LECPC at 8-13; Telenet LECPC at 6.

97 Iowa LECPC at 12; Michigan LECPC at 6.

98 Ohio LECPC at 8-9.

99 Ad Hoc LECPC at 51-53.

100 SW Bell *ex parte* filing, Feb. 22, 1991.

101 Bell Atlantic *ex parte* filing, Apr. 11, 1991.

these percentages are already compiled by the BOCs, so this requirement imposes little additional administrative cost. Any significant difference between the adjustments the LECs make to the rates for BSEs used primarily by LEC ESPs and those made to rates of BSEs used primarily by unaffiliated ESPs will be apparent. If the data suggest that rates for the first group are generally decreasing, while the rates for the latter are generally increasing, we will take appropriate action, and the LECs' customers will also be in a position to challenge the LECs' actions.

C. Access Charge Treatment of ESPs

54. *Background.* One of the Commission's primary objectives with respect to the formulation of our access charge rules has been to assess access charges on all users of exchange access, irrespective of their designation as carriers, non-carrier service providers, or private customers.[102] Nevertheless, as the *Notice* explains, the Commission adopted an interim exemption from full access charge treatment for a number of interstate service providers to permit them to avoid service-disrupting "rate shock."[103] We have refrained from applying full access charges to ESPs out of concern that the industry has continued to be affected by a number of significant, potentially disruptive, and rapidly changing circumstances.[104]

55. *Proposal.* The *Notice* supported retaining the ESP exemption in its current form to provide "predictability and stability for the enhanced services industry during the transition to ONA." [105] However, we also invited comments on the relative merits of two specific alternatives to the current exemption. Both would have required ESPs to purchase interstate access for their interstate traffic. One would have exempted ESPs from paying the carrier common line charge (CCLC), while the other would have given ESPs an across-the-board discount on all switched access rates. The *Notice* decided against consideration of a "mix-and-match" option, which would have permitted customers to use a state-tariffed local business line BSA with a federally tariffed BSE.

56. *Comments.* Comments focus on four aspects of this issue: the retention of the current exemption, the two proposed alternatives to that exemption, the possibility of mix-and-match, and the availability of a specially priced federal BSA for ESPs. All ESPs, many users, NTIA, and many state regulators support retention of the current exemption. ESPs argue that the rates they currently pay cover the costs of services ESPs receive and that current interstate access charges are derived from flawed separations formulas, which inflate interstate charges. They also contend that ESPs are end users and that the "exemption" is not really an exemption. ESPs and others argue that, if the current exemption were eliminated, the resulting rate shock would devastate the fragile emerging ESP industry, without much beneficial impact on the rates of others.[106] Indeed, as discussed below, ESPs contend that additional discounted access options are necessary.

57. Many LECs and state regulatory agencies support a phase-out of the exemption. All LECs argue that it is unfair to give ESPs a special preference, and most state that other users absorb the costs not covered by the ESPs. BellSouth disputes the contention that the ESP industry would be severely damaged by "rate shock" and MCI challenges the ESP claims that the benefit generated for other ratepayers would be trivial.[107]

58. There is almost no support for the two alternatives to the current exemption described in the *Notice*. The ESPs argue that neither an exemption from CCLC rates nor an across-the-board discount would compare to the value of their current exemption. The LECs generally contend that both approaches create a more difficult problem with identifying ESPs and thus enforcing the rule. Only MCI supports an across-the-board discount, arguing that a 55% discount, for example, would only increase ESP user rates by 4.5%[108]

59. Although ESPs generally oppose the two alternatives described in the *Notice*, certain ESPs advocate that, in addition to the current exemption, the Commission should create a special BSA for ESPs that would be priced lower than BSAs used by IXCs and other access customers. They argue that ESPs will not purchase federal BSA/BSEs unless the costs of those elements are reduced to recognize that ESPs do not use 4-wire trunkside connections, 1+ presubscription, and other standard Feature Group D enhancements. MCI responds that ESPs should focus on unbundling Feature Group A, which they take, rather than Feature Group D, which ESPs generally do not take. Some ESPs propose a lineside BSA priced on the basis of unseparated average common line and traffic sensitive costs and argue that the Commission should begin a Part 36 and Part 69 proceeding to eliminate any subsidies in interstate rates. ESPs generally support a flat rate special BSA for ESPs. BellSouth and US West argue that such flat rated services unreasonably discriminate

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[102] A more detailed discussion of this background is provided in Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, CC Docket No. 87-215, 2 FCC Rcd 4305 (1987) and MTS and WATS Market Structure, Memorandum Opinion and Order, CC Docket No. 78-72, 97 FCC 2d 682, 711, 715 (1983).

[103] *Notice*, 4 FCC Rcd at 3987 paras. 29-30.

[104] *See* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, CC Docket No. 87-215, 3 FCC Rcd 2631 (1988)

[105] *Notice*, at 3987 para. 33.

[106] See, e.g., ABA Comments at 6-9; ADAPSO Comments at 3-13, 17, 20-29, 38-41; ALA Comments at 1; API Comments at 7; Bankers Comments at 3,4; CONAP Comments at 8-17, 30-33; CompuServe Comments at 9, 17-33; CBEMA Comments at 10, 14-16, 23; Dialcom Comments at 5-15, 27-29; EMA Comments at 8-14; GE Comments at 4-5, 8-18; Joint Parties Comments at 6-13; McGraw-Hill Comments at 5-7; Motorola Comments at 1-4; NDC Comments at 3-7; ONA Users' Comments at 6-19, Reply at 6-14; Prodigy Comments at 5, 8-11; Telenet Comments at 2-9, 12-18, 26-35; Tymnet Comments at 7-9, 14-15, 19-30; Ameritech States Comments at 6; Florida Comments at 7; Iowa Comments at 9; Maryland Reply at 4-5; NARUC Comments at 6; NTIA Comments at 10-13; New Jersey Reply at 2-3.

[107] Alltel Comments at 7, 9; Ameritech Comments at 16-19, 27; Bell Atlantic Comments at 13-15; BellSouth Comments at 20-21, Reply at 24-27; Contel Comments at 3-4, 9-10; DC Comments at 7-8; ICTC Comments at 6-7; MCI Reply at 21-23, 34; NYNEX Comments at 27-30; Pacific Comments at 12; SW Bell Comments at 8-9; SW Bell Regulators Comments at 8; US West Comments at 23-47; USTA Comments at 22-24.

[108] See, Allnet Comments at 6; CompuServe Comments at 19 n. 49; MCI Comments at 19-20, 24; ONA Users Comments at 30.

against the smaller ESPs. Some ESPs also argue vigorously for the opportunity to mix federally tariffed BSAs with state-tariffed BSEs and dispute the Commission's conclusion that this would create a cost/revenue mismatch. All of the LECs and states that commented oppose the availability of mix-and-match, for the reasons given in the *Notice*.[109]

60. *Decision.* We conclude that the best approach is the adoption of the tentative conclusion of the *Notice:* retention of the current form of the exemption. This approach maintains the *status quo,* and provides stability to ESPs as the BOCs proceed with ONA tariffing.[110] Replacing the current exemption with either of the federal alternatives described in the *Notice* would disrupt the enhanced services industry during a time of rapid transition, without yielding concomitant benefits.[111]

61. Although ESPs generally did not endorse the discount alternative described in the *Notice,* some ESPs do advocate adoption of a sharply discounted federal BSA. First, ESPs contend that interstate access arrangements currently include many features they do not use and for which they should not be required to pay.[112] However, as MCI has noted, the ESPs' lists of undesired features are primarily features associated with trunkside access, while ESPs generally take lineside access, which does not include those features. Moreover, we are requiring LECs to unbundle lineside access, which is already generally less expensive than Feature Group D access.

62. The entirely flat-rate switched BSA proposed by some ESPs is inconsistent with our current rate structure, which requires per minute charges for local switching and carrier common line BSA elements. We see no reason to deviate from these usage-sensitive rate structures for one group of access users, particularly as a flat rate would favor larger established ESPs over smaller companies.

63. Rather than introducing a special BSA for ESPs, we pursue the underlying concept of ONA by unbundling access, so that customers may select from a basic building block access arrangement, choosing optional additional features and functions and paying only for what they use.[113] Towards this end we have pressed the BOCs to ensure that a large number of the BSEs actually requested by ESPs will be available in all regions. We also have sought greater uniformity in ONA services in a variety of forums, including the Information Industry Liaison Committee, and the Federal-State ONA Joint Conference. We have required as well that all BSEs be available in interstate tariffs.

64. We have always viewed ONA as an evolutionary process[114] and we will continue to take an active interest in the future of ONA. We will examine further unbundling and other issues related to the future of ONA in the context of other proceedings, such as our review of the BOC ONA Amendments filed April 15, 1991, our *Expanded Interconnection* proceeding, and the CONAP Petition for Investigation.[115] We believe that ESPs and other users may see longer term benefits if further unbundling is required by the Commission.

65. Some ESPs have requested that we permit them to mix-and-match federal and state BSAs and BSEs. The *Notice* explicitly decided against a mix-and-match option and commenters have presented us with no arguments that would lead us to a different conclusion. We reject mix-and-match for the reasons given in the *Notice.* We are concerned that mix-and-match could result in a mismatch of BSE costs and revenues, seriously undermine state policies, and create jurisdictional boundary problems.

D. Other Issues

1. Jurisdictional Measurement

66. *Background/Proposal.* The difficulty of measuring interstate and intrastate usage of the network is not a new issue. When the LEC has no reasonable way to measure jurisdictional usage, the federal tariffs have traditionally provided that customers report the percentage of interstate usage (PIU). Furthermore, when customers also found it impractical to make precise PIU measurements for Feature Group A and Feature Group B lines, the Joint Board in CC Docket No. 85-124 developed the entry/exit surrogate (EES) method. Under the EES, access customers designate the jurisdictional status of a call based on the relationship between the point where a call first enters their network (*e.g.,* their POP) and the terminating num-

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[109] See, e.g., ADAPSO Comments at 16-20, 37-45; Allnet Comments at 7; Ameritech Comments at 25; Ameritech States Comments at 7; Bell Atlantic Comments at 17-18; BellSouth Comments at 21, Reply at 6 & n. 8; CBEMA Comments at 17-19; CompuServe Comments at 24, 35-36; CONAP Comments at 27-30, 37-39; Contel Comments at 10; Dialcom Comments at 23, 27-30; DC Comments at 9; EMA Comments at 17; ETI Report at 6-30; Florida Comments at 7; GE Comments at 11 & n. 18, Reply at 8-11, 38-39; ICA Comments at 7; Iowa Comments at 9; Joint Parties' Comments at 11-12, 18-22; Maryland Comments at 2; McGraw-Hill Comments at 6, 8, Reply at 10; MCI Reply at 24-28; NARUC Comments at 6; NDC Reply at 8-9; New Jersey Reply at 3; New York Reply at 7-9; ONA Users Group Comments at 29-32; PacTel Comments at 13; Prodigy Comments at 7, 12, 17; SW Bell Comments at 40; SW Bell Regulators Comments at 8; Telenet Comments at 10-11, 18-23, 26-27, 47-48, 55-57; Tymnet at 9-14, 32-33; USTA Comments at 24-25; US West Comments at 8, 42-44; Virginia Comments at 7; Joint *ex parte* filing by Bankers, ICA, ONA Users, Prodigy, Tymnet (BT North America), et al., Apr. 30, 1991.

[110] Some LECs have argued that we should establish a timetable for phasing out the exemption. The *Notice* proposed simply to retain the exemption in its current form, however, and the enhanced services industry continues to be confronted with a variety of regulatory changes, including the implementation of ONA. We therefore believe it would be premature to set any timetable for phasing out the exemption.

[111] *See National Ass'n of Regulatory Utility Commissioners v. FCC,* 737 F. 2d 1095, 1136 (D.C. Cir. 1984),*cert. denied,* 469 U.S. 1227 (1985) (upholding exemption "to avoid unnecessary customer impact or market displacement").

[112] Some ESPs base their argument on the contention that the separations process results in inflated interstate rates. To the extent that parties argue for a Part 69 or Part 36 proceeding to eliminate "subsidies" in interstate access, such requests are beyond the scope of this proceeding, which has sought to integrate ONA into the existing separations and access charge framework. Thus, we will not require that LECs ignore separations in setting prices for federally tariffed ONA services when they are purchased by ESPs.

[113] *BOC ONA Order,* 4 FCC Rcd at 42-43 paras. 70-72.

[114] Id. at 43 para. 72.

[115] Expanded Interconnection with Local Telephone Company Facilities, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd _____, CC Docket 91-141, FCC 91-159, adopted May 9, 1991; In re Advanced Intelligent Network, Petition for Investigation, Coalition of Open Network Architecture Parties, Nov. 16, 1990.

ber. The *BOC ONA Order* concluded that since switched BSAs are technically similar to feature groups, no changes needed to be made to the EES method for ONA services.[116] The *Notice* invited comment on any discrete measurement problems. The *Notice* also suggested that the jurisdictional nature of a BSE should track that of the associated BSA.

67. *Comments.* Most LECs and USTA support the use of the EES method to compute the PIU for BSA/BSEs.[117] Many add that suitable auditing or verification safeguards are needed.[118] The states are divided -- SW Bell Regulators and the Ameritech States offer unqualified support for the EES method,[119] while Florida supports the use of EES in the absence of any viable alternative.[120] DC urges the Commission to require the BOCs to use Signaling System 7 or otherwise secure actual data to eliminate the need for less accurate customer-reported data.[121] Virginia suggests that subdividing local switching into separate segments for BSAs and BSEs would represent a partial solution.[122] Two states raise a fundamental question about how calls should be classified.[123] Florida states its belief that "the nature of the access should be determined from the point of the call's origination to the point of the ESP's location," but it seeks clarification as to how this Commission defines interstate enhanced service. California states that a Joint Board is needed to resolve jurisdictional measurement issues.[124] Most ESPs argue that the EES method is inadequate.[125] They argue that neither ESP customers nor ESPs are able to ascertain accurately which calls are intrastate and which are interstate. They complain that the cost of measuring currently unmeasured traffic would be prohibitive. Allnet appears to advocate separate PIUs for access to basic and enhanced services.[126]

68. *Decision.* The record does not clearly indicate that a new rule is necessary. While minor adjustments or interpretations may be needed for specific usage circumstances, we do not believe the record is sufficient for us to identify those circumstances or attempt to devise new rules. Nor do we believe the record warrants referral to a Joint Board at this time. We also find that when actual BSE measurement is impractical, LECs should apply the jurisdictional usage of the underlying BSA to BSEs associated with that BSA. We believe that, in most circumstances, usage of the BSE will be similar to that of the associated BSA, and we find that this approach is the only feasible procedure for implementing unbundling in the federal access tariffs.[127]

2. Computer III Pricing Rules

69. The *Computer III* decision established three pricing rules for basic ONA services. BOCs were required to include an averaged Basic Interconnection Charge (IC) and an averaged Basic Concentration Charge (BCC) in ONA tariffs and permitted, although not required, to set transmission rates to reflect distance-sensitive costs.[128] As explained in the *Notice*, given that the BOCs all employ parity pricing[129] to minimize transmission costs,[130] these *Computer III* rules are redundant. Virtually all comments on this issue supported our observation.[131] We find it in the public interest to pursue our goals of equality and efficiency in this context by relying on parity pricing. We therefore eliminate the BIC, BCC, and distance sensitive *Computer III* ONA pricing rules.

3. The Impact of ONA on Separations

70. *Comments.* A number of parties express concerns about the impact of ONA on current separations rules. Five states and NARUC argue that current separations formulas will allocate too large a portion of costs to the state jurisdiction because, in their view: 1) costly new technologies, such as Common Channel Signaling System No. 7 (SS7) will be used primarily, if not exclusively, for interstate services; and 2) the interstate usage of many new federal BSEs will be ignored by current cost allocation formulas.[132] These states argue that there will be cost/revenue mismatches between the jurisdictions. Others dispute these claims, contending that, with respect to SS7, the Commission has already found that it is not primarily an interstate service.[133] Bell Atlantic also states that the ONA separations issues are already being addressed. [134]

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[116] 4 FCC Rcd 1,142-45, paras. 275,278.

[117] Ameritech Comments at 14-15; Bell Atlantic Comments at 12; BellSouth Comments at 16-17; NYNEX Comments at 23-24; SW Bell Comments at 26-27; USTA Comments at 20-21; US West Comments at 23. ICTC states that PIU should be extended to the billing of ONA services where jurisdictional measurement capabilities do not exist. ICTC Comments at 7-8.

[118] Bell Atlantic Comments at 12; NYNEX Comments at 23-24; USTA Comments at 21; US West Comments at 23.

[119] Ameritech States Comments at 5-6; SW Bell Regulators Comments at 6-7.

[120] Florida Comments at 7.

[121] DC Comments at 6-7.

[122] Virginia Comments at 3.

[123] Florida Comments at 4-7. *See also* Maryland Comments at 1.

[124] California Comments *passim.*

[125] ADAPSO Comments at 29-37; CompuServe Comments at 33-34; Dialcom Comments at 36-39; GE Comments at 18; Prodigy Comments at 12-15; Telenet Comments at 36-37.

[126] Allnet Comments at 2-3.

[127] Florida requests that the Commission clarify its definition of the jurisdictional nature of access. This issue has also been raised in the context of the Petition for Declaratory Ruling that States and the District of Columbia Are Preempted From Imposing Public Utility Regulations on Enhanced Service Providers, filed Feb. 1, 1991. Therefore, we decline to address the issue in this proceeding.

[128] *Notice*, at 3989-90 paras. 48-49.

[129] Telenet argues that BOC parity pricing requirement is merely permissive. Telenet Reply at 30-31. We would have to review and approve any BOC departure from parity pricing, however, because our approval of the BOC ONA plans was premised on the use of parity pricing to satisfy our minimization-of-transmission-cost requirement. *Notice*, at 3989 para. 49.

[130] *Phase I Further Reconsideration*, 3 FCC Rcd 1135, 1141 para. 46 (1988); *Phase II Reconsideration*, 3 FCC Rcd 1150, 1157 para. 49 (1988).

[131] *Notice* at 3989-90 paras. 48-49; Ameritech Comments at 26; Bell Atlantic Comments at 11; BellSouth Comments at 21-2; NYNEX Comments at 28-9; SW Bell Comments at 41-3; US West Comments at 48-9.

[132] California Comments *passim;* Florida Comments at 7-8; Iowa Comments at 4-5; Maryland Comments at 2; NARUC Comments at 7-8; Virginia Comments at 3-4. SW Bell Regulators argue for a postponement until the separations issues are resolved. SW Bell Regulators Reply at 5.

[133] BellSouth Reply at 30-31; CONAP Reply at 17-19.

[134] Bell Atlantic Reply at 8.

Most ESPs argue, by contrast, that the current separations rules allocate costs disproportionately to the interstate jurisdiction and that this will have a particularly harmful affect on ONA.[135] Bell South contends that the ESPs' separations arguments are beyond the scope of this proceeding.[136]

71. *Decision.* The Federal-State ONA Joint Conference gathered preliminary information on the extent of any jurisdictional separations problem. The results indicated minimal effects, but the information was subsequently referred to the Joint Board in CC Docket No. 80-286, and the Joint Conference requested that the Joint Board take cognizance of the information in its consideration of related issues.[137] Given the Joint Conference survey and the slight impact that ONA will likely have on separations, we feel that it is in the public interest not to delay ONA and its expected public benefits until possible separations questions are resolved. [138] Any specific issues raised by the implementation of ONA in the Communications Act's regime of dual jurisdiction can be resolved as they arise.

4. Pending Waiver Requests

72. We now address two pending requests for waiver of our Part 69 rules. Ameritech requests us to waive our rules to permit it to unbundle its local switching rate element. Southwestern Bell requests a waiver to establish a specialized trunkside "FGK" BSA and two new BSEs: billing number identification and calling number identification. Parties commenting on the waiver request argue that the petitions raise the same issues discussed in the *Notice* in this proceeding, and that granting waivers would require addressing in a piecemeal fashion issues better resolved in a comprehensive rulemaking.

73. We believe that this order renders moot the need for us to act on either the Ameritech or Southwestern Bell petitions for waiver of our Part 69 rules. Our decisions should permit both BOCs to achieve most, if not all, of what they sought in their waiver requests. Ameritech will be permitted to file tariffs for unbundled BSA/BSEs, subject to our amended rules, and we believe that our decision obviates Southwestern Bell's need to establish a new Feature Group K offering. If either party still feels the need for a waiver of our new rules, it is, of course, free to refile a waiver request based on this order.

IV. SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

74. We noted above that after this initial tariffing procedure, future unbundled BSEs may be restructured or new services under price cap regulation. In this order we adopt pricing rules for all new services provided by price cap LECs, including BSEs. We believe that those rules, requiring cost support and additional disclosures, are adequate to deal with the greater danger of discrimination inherent in ONA services, which are provided to competitors of the BOC ESP operations. We are concerned, however, that the general rules for restructured services do not provide sufficient protection against unreasonable discrimination. The showing for restructured services requires price cap carriers to recast demand and demonstrate compliance with applicable basket and banding requirements. While we believe that our pricing rules for restructured services are appropriate for most price cap LEC offerings, we are concerned that these rules may not be sufficient to address the increased potential for unreasonable discrimination that arises with ONA services, which are provided to LEC competitors.

75. We tentatively conclude that we should place an additional restriction on future unbundled BSA/BSEs that qualify as restructured under the price cap rules. We seek comment on this conclusion and on possible ways to constrain the potential for discrimination in the least burdensome manner. We could, for instance, require LECs not only to satisfy the restructured services test under price caps, but also to make the new cost support showing for new services that we are adopting above. We seek comment on whether treating restructured ONA services differently from restructured non-ONA services raises any implementation problems. Parties are also invited to comment on whether non-cost-based pricing rules for future restructured ONA services could be developed that would serve to constrain LECs' ability to discriminate without unduly hampering the LECs' ability to price efficiently. Parties arguing for alternatives other than the option set forth above should offer specific proposals.

V. CONCLUSION

76. This order amends the Commission's Part 69 access charge rules to enable the Bell Operating Companies (BOCs) to offer Open Network Architecture (ONA) services. The rules adopted in this order enable the BOCs to treat the basic service elements (BSEs) as unbundled, individually priced rate subelements, as required by our *BOC ONA Order*. In addition, this order modifies the general *LEC Price Cap Order* new services test to place a flexible upper bound on new service prices. The new rules require the BOCs to provide detailed cost support for their initial BSE prices and for other new services. Once initial BSE and BSA element prices have become effective and adequate historical data have been generated, the services will be brought under price caps, subject to an additional disclosure requirement. The BOCs are required to file tariffs on or before November 1, 1991, on 90 days' notice, to provide the initial ONA offerings. In this Order we retain the current enhanced service provider (ESP) exemption in its current form. We also seek further comment on what pricing rules should apply to BSEs that would be considered "restructured" under the price cap rules.

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[135] ESPs argue that the separations rules are so unfair to interstate carriers that ESPs deserve a large special discount on interstate access. This is discussed in section III. C., *supra*.

[136] BellSouth Reply at 32 n. 38.

[137] As we have previously noted," CCS7 represents a general network upgrade that will be used for a wide variety of both intrastate and interstate services." *Provision of Access for 800 Service*, 4 FCC Rcd 2824, para. 73 (1989) *recon.* pending.

[138] We view as beyond the scope of this proceeding suggestions, such as those of ETI, that the Commission begin fundamental separations reform.

VI. PROCEDURAL MATTERS

A. Ex Parte

77. This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission's rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

78. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Supplemental Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

C. Notice and Comment Provision

79. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before August 26, 1991, and reply comments on or before September 25, 1991. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information regarding this Supplemental Notice of Proposed Rulemaking contact Mark S. Nadel, Common Carrier Bureau, Policy and Program Planning Division, (202) 632-6363.

VII. ORDERING CLAUSES

80. Accordingly, IT IS ORDERED, that, pursuant to Sections 151, 154(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) & (j), 201-205, 303(r), and 405, Parts 61 and Part 69 of the Commission's rules, 47 C.F.R. Parts 61 and 69, ARE AMENDED as set forth in Appendix A.

81. IT IS FURTHER ORDERED that the BOCs file tariffs that conform to these rules by November 1, 1991, effective on 90 days' notice.

82. IT IS FURTHER ORDERED that Ameritech's petition for waiver of Part 69 rules concerning local switching, filed on June 26, 1990, is DENIED as moot.

83. IT IS FURTHER ORDERED that Southwestern Bell's petition for waiver of Part 69 of the Commission's rules for feature group K switched access service, filed on September 6, 1990, is DENIED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61 and 69 are amended as follows:

PART 61 -- TARIFFS

1. Section 61.49 is amended by adding a new paragraph (h) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

* * * * *

(h) Each tariff filing by a local exchange carrier that introduces a new service that will later be included in a basket must also be accompanied by

(1) The following, including complete explanations of the bases for the estimates.

(a) A study containing a projection of costs for a representative 12 month period; and

(b) Estimates of the effect of the new tariff on the traffic and revenues from the service to which the new tariff applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in paragraph (h)(1)(a) of this section.

(2) Working papers and statistical data.

(a) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the Chief, Tariff Review Branch must be provided two sets of working papers containing the information underlying the data supplied in response to paragraph (h)(1), of this section, and a clear explanation of how the working papers relate to that information.

(b) All statistical studies must be submitted and supported in the form prescribed in § 1.363 of the Commission's Rules.

* * * * *

PART 69 -- ACCESS CHARGES

2. Section 69.2 is amended by adding the following new paragraph (mm) to read as follows:

§ 69.2 Definitions

* * * * *

(mm) "Basic Service Elements" are optional unbundled features that enhanced service providers may require or find useful in the provision of enhanced services, as defined in Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order, 6 FCC Rcd _____, CC Docket No. 89-79, FCC 91-186 (1991).

3. Section 69.4 is amended by revising paragraph (b) to read as follows:

§ 69.4 Charges to be filed.

* * * * *

(b) Except as provided in Subpart C of this Part, in paragraphs 69.4 (c) and (d), and in § 69.118, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements:

(1) Limited pay telephone;

(2) Carrier common line;

(3) Local switching;

(4) Information;

(5) Common transport;

(6) Dedicated transport; and

(7) Special access.

* * * * *

4. Section 69.106 is amended by revising paragraph (a) to read as follows:

§ 69.106 Local switching.

(a) Except as provided in § 69.118, charges that are expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services.

* * * * *

5. Section 69.107 is amended by revising paragraphs (a) and (b) to read as follows:

§ 69.107 Equal Access

(a) A monthly charge that is expressed in dollars and cents either per Feature Group D trunk, per presubscribed equal access line, or per trunk line that is receiving from a local exchange switch service that is substantially equivalent to the access provided for MTS or WATS, shall be assessed by telephone companies that implement an Equal Access element as provided in paragraph 69.4(d) upon all interexchange carriers for either the interstate and foreign Feature Group D access service trunks the interexchange carriers uses, the interstate and foreign access service trunk lines receiving service substantially equivalent to the access provided for MTS or WATS from a local exchange switch, or the presubscribed equal access lines the carrier serves.

(b) A monthly charge per Feature Group D trunk or per trunk line that is receiving from a local exchange switch service that is substantially equivalent to the access provided for MTS or WATS shall be computed by dividing the projected annual revenue requirement for the Equal Access element by twelve times the projected annual average number of the total of interstate and foreign Feature Group D access service trunks and interstate and foreign access service trunk lines receiving service substantially equivalent to the access provided for MTS or WATS from a local exchange switch.

6. Section 69.109 is amended by revising paragraph (b) to read as follows:

§ 69.109 Information.

* * * * *

(b) Except as provided in § 69.118, if such connections are maintained exclusively by carriers that offer MTS, the projected annual revenue requirement for the Information element shall be divided by 12 to compute the monthly assessment to such carriers.

* * * * *

7. Section 69.111 is amended by revising paragraph (a) to read as follows:

§ 69.111 Common transport.

(a) Except as provided in § 69.118, a charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers that use (1) switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning net investment, or

(2) equivalent facilities offered by carriers subject to price cap regulation as the term is defined in § 61.3(v) of this chapter.

* * * * *

8. Section 69.112 is amended by revising the first two sentences of paragraph (b) to read as follows:

§ 69.112 Dedicated transport.

* * * * *

(b) Appropriate subelements shall be established for the use of interface arrangements. Except as provided in § 69.118, charges for such subelements shall be assessed and computed as follows:

* * * * *

9. Section 69.113 is amended by revising paragraph (a) and adding a new paragraph (e) to read as follows:

§ 69.113 Non-premium charges for MTS-WATS equivalent services.

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive access that is not deemed to be premium access (as this term is defined in § 69.105(b)(1)) in lieu of carrier charges that are computed in accordance with § 69.105, § 69.106, § 69.111, § 69.112 and § 69.118.

* * * * *

(e) The non-premium charge for any BSEs in transport or local switching shall be computed by multiplying the premium charge for the corresponding BSEs by. 45.

* * * * *

10. New section 69.118 is added to read as follows:

§ 69.118 Traffic sensitive switched services.

Notwithstanding § 69.4(b), § 69.106, § 69.109, § 69.111, and § 69.112, telephone companies subject to the *BOC ONA Order*, 4 FCC Rcd 1 (1988), shall, and other telephone companies may, establish approved Basic Service Elements as provided in Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order, 6 FCC Rcd _____, CC Docket No. 89-79, FCC 91-186 (1991). Telephone companies shall take into account revenues from the relevant Basic Service Element or Elements in computing rates for the Local Switching, Common Transport, Dedicated Transport, and/or Information elements.

11. New section 69.119 is added to read as follows:

§ 69.119 Basic service element expedited approval process.

The rules for filing comments and reply comments on requests for expedited approval of new basic service elements are those indicated in § 1.45 of the rules, except as specified otherwise.

12. Section 69.205 is amended by revising paragraph (a) to read as follows:

§ 69.205 Transitional premium charges.

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive premium access in lieu of carrier charges that are computed in accordance with § 69.106 § 69.111, § 69.112, and § 69.118 of this part if any carrier or other person does not receive premium access, as this term is defined in § 69.105.

APPENDIX B

LISTS OF COMMENTERS

1. COMMENTS & REPLY COMMENTS ON ONA/PART 69, CC DOCKET 89-79

a. Initial Comments

1. ADAPSO (ADAPSO Comments)

2. Aeronautical Radio, Inc., Information Industry Association, National Retail Merchants Association, Tele-Communications Association, and Xerox Corporation (Joint Parties Comments)

3. Allnet Communication Services, Inc. (Allnet Comments)

4. Alltel Operating Companies (Alltel Comments)

5. American Bankers Ass'n. (Bankers Comments)

6. American Bar Association (ABA Comments)

7. American Library Ass'n. (ALA Comments)

8. American Petroleum Institute (API Comments)

9. American Telephone & Telegraph Co. (AT&T Comments)

10. Ameritech Operating Companies (Ameritech Comments)

11. The Ameritech States (Ameritech States Comments)

12. Arkansas Public Service Commission, Kansas Corporation Commission, Oklahoma Corporation Commission, Missouri Corporation Commission, Texas Public Utility Commission, on Behalf of the Southwestern Bell Regional Regulatory Group (SW Bell Regulators Comments)

13. Bell Atlantic Telephone Cos. (Bell Atlantic Comments)

14. BellSouth Telephone Cos. (BellSouth Comments)

15. People of the State of California and the Public Utilities Commission of the State of California (California Comments)

16. California Bankers Clearing House Association, Committee of Corporate Telecommunications Users, Mastercard International Incorporated, New York Clearing House Association and VISA U.S.A., Inc. (ONA Users Group Comments)

17. Coalition of Open Network Architecture Parties, and the Ad Hoc Telecommunications Users Committee (CONAP Comments)

18. Compuserve, Inc. (Compuserve Comments)

19. Computer & Business Equipment Manufacturers Association (CBEMA Comments)

20. Contel Corp. (Contel Comments)

21. Dialcom, Inc. (Dialcom Comments)

22. Public Service Commission of the District of Columbia (DC Comments)

23. Electronic Mail Association (EMA Comments)

24. Florida Public Service Commission. (Florida Comments)

25. General Electric Communications & Services (GE Comments)

26. GTE Service Corp. and its affiliated domestic telephone operating companies (GTE Comments)

27. Illinois Consolidated Telephone Co. (ICTC Comments)

28. Independent Data Communications Manufacturers Ass'n. (IDCMA Comments)

29. Integrated Communications Systems, Inc. (ICS Comments)

30. International Communications Ass'n. (ICA Comments)

31. Iowa State Utilities Board (Iowa Comments)

32. Public Service Commission of Maryland (Maryland Comments)

33. McGraw-Hill, Inc. (McGraw-Hill Comments)

34. MCI Telecommunications Corp. (MCI Comments)

35. Motorola, Inc. (Motorola Comments)

36. National Ass'n of Regulatory Utility Commissioners (NARUC Comments)

37. National Data Corp. (NDC Comments)

38. National Exchange Carrier Assn. (NECA Comments)

39. National Telecommunications & Information Administration (NTIA Comments)

40. New York Dept. of Public Service (New York Comments)

41. NYNEX Telephone Cos. (NYNEX Comments)

42. Pacific Bell & Nevada Bell (Pacific Comments)

43. Prodigy Services Co. (Prodigy Comments)

44. Southwestern Bell Telephone Co. (SW Bell Comments)

45. Telenet Communications Corp. (Telenet Comments)

46. Telephone Utilities Exchange Carrier Assoc. (TUECA Comments)

47. Telocator (Telocator Comments)

48. Tymnet-McDonnell Douglas Network Systems Co. (Tymnet Comments)

49. United States Telephone Ass'n (USTA Comments)

50. United Telephone Operating Cos. (United Comments)

51. US West (US West Comments)

52. Utilities Telecommunications Council (UTC Comments)

53. Virginia State Corporation Commission (Virginia Comments)

b. Reply Comments

1. Aeronautical Radio, Inc., Information Industry Association, National Retail Merchants Association, Tele-Communications Association and Xerox Corporation (Joint Parties Reply)

2. Alarm Industry Communications Committee (AICC Reply)

3. Alltel Telephone Operating Companies (Alltel Reply)

4. American Petroleum Institute (API Reply)

5. Ameritech Operating Companies (Ameritech Reply)

6. Ameritech States (Ameritech States Reply)

7. Association of American Railroads (AAR Reply)

8. Association of Telemessaging Services International, Inc. (ATSI Reply)

9. Bell Atlantic Telephone Companies (Bell Atlantic Reply)

10. BellSouth Telephone Companies (BellSouth Reply)

11. California PUC/People of the State of California (California Reply)

12. California Bankers Clearing House Association, Committee of Corporate Telecommunications Users, Mastercard International Incorporated, New York Clearing House Association and Visa U.S.A., Inc. (ONA Users Group Reply)

13. Coalition of Open Network Architecture Parties and the Ad Hoc Telecommunications Users Committee (CONAP Reply)

14. CompuServe Incorporated (CompuServe Reply)

15. District of Columbia PSC (DC Reply)

16. GTE Service Corporation (GTE Reply)

17. General Electric Communications and Services (GE Reply)

18. Integrated Communication Systems Inc. (ICS Reply)

19. Maryland PSC (Maryland Reply)

20. McGraw-Hill, Inc. (McGraw-Hill Reply)

21. MCI Telecommunications Corporation (MCI Reply)

22. National Association of Regulatory Utility Commissioners (NARUC Reply)

23. National Data Corporation (NDC Reply)

24. National Telephone Cooperative Association (NTCA Reply)

25. New Jersey Board of Public Utilities (New Jersey Reply)

26. New York Department of Public Service (New York Reply)

27. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX Reply)

28. Pacific Bell and Nevada Bell (Pactel Reply)

29. Prodigy Services Company (Prodigy Reply)

30. Southwestern Bell Regional Regulatory Group (SW Bell Regulators Reply)

31. Southwestern Bell Telephone Company (SW Bell Reply)

32. Telenet Communications Corporation (Telenet Reply)

33. Tynmet-McDonnell Douglas Network Systems Company (Tymnet Reply)

34. United States Telephone Association (USTA Reply)

35. US West, Inc. (US West Reply)

36. Utilities Telecommunications Council (UTC Reply)

37. Virginia State Corporation Commission (Virginia Reply)

2. COMMENTS, REPLY COMMENTS, MCI PETITIONS, ETC. ON PRICE CAPS AND RECONSIDERATION RELATING TO ONA

a. Comments on LEC Price Cap Order

1. Ad Hoc Telecommunications Users Committee (Ad Hoc LECPC)
2. American Telephone & Telegraph (AT&T LECPC)
3. Independent Data Communications Manufacturers Ass'n. (IDCMA LECPC)
4. Iowa (Iowa LECPC)
5. MCI (MCI LECPC)
6. Michigan (Michigan LECPC)
7. Ohio (Ohio LECPC)
8. Telenet (Telenet LECPC)

b. Reply Comments on LEC Price Cap Order

1. Ad Hoc Telecommunications Users Committee (Ad Hoc LECPC Reply)
2. Colorado (Colorado LECPC Reply)
3. International Communications Ass'n (ICA LECPC Reply)
4. Tele-Communications Ass'n. (TCA LECPC Reply)

c. Petitions for Reconsideration of LEC Price Cap Order

1. MCI (MCI Recon. Petition)

d. Oppositions to Petitions for Reconsideration of LEC Price Cap Order

1. BellSouth (BellSouth Opposition)
2. NYNEX (NYNEX Opposition)
3. Pacific Telephone (PacTel Opposition)
4. Southwestern Bell Telephone (SW Bell Opposition)
5. United States Telephone Ass'n (USTA Opposition)

e. Replies to Reconsideration of LEC Price Cap Order

1. MCI (MCI Recon. Reply)

3. COMMENTS ON AMERITECH & SW BELL WAIVER PETITIONS

a. Comments on Ameritech Waiver Petition

1. Ad Hoc Telecommunications Users Committee
2. ADAPSO
3. Allnet Communications Services, Inc.
4. Ameritech States
5. BT Tymnet Inc.
6. California PUC
7. MCI
8. NYNEX
9. US Sprint

b. Comments and Reply Comments on Southwestern Bell Waiver

1. Ad Hoc Telecommunications Users Committee
2. ADAPSO (Reply)
3. Allnet Communications Services, Inc.
4. BT Tymnet Inc.
5. MCI
6. Southwestern Bell (Reply)
7. Texas PUC
8. US Sprint

APPENDIX C
SUMMARY OF FILING REQUIREMENTS

To assist in the preparation of ONA tariffs, this appendix summarizes the tariff filing requirements set forth in the text of this Order. The information presented here outlines sequentially the steps that must be taken in the preparation and filing of ONA and new services offerings. References to the textual discussion are included. In case of any inconsistency or ambiguity, the text of the order controls.

The Appendix is presented by type of filing. An index of the types of filings summarized is as follows:

I. BOC ONA Filings: BSEs Included in Any Approved ONA Plan or Otherwise Previously Approved

II. BOC ONA Filings: New BSEs Not Previously Approved

III. BOC Annual Filings: Additional Requirements Due to ONA

IV. ONA Filings for Non-BOCs

V. Other New Service Filings for Price Cap LECs

I. BOC ONA Filings: BSEs Included in Any Approved ONA Plan Or Otherwise Previously Approved

A. Preliminary to Filing the Tariff

Waiver requirement: None (para. 14)

B. Tariff Filing

1. Notice: 90 days' notice for the initial ONA filing

45 days' notice for changes or modifications to tariffs in effect until the filing becomes incorporated into price cap indexes

2. Cost support:

a. Net revenue showing (paras. 39, 42)

b. Regardless of the cost model chosen, cost support must include the following information: a study containing a projection of costs for a representative 12 month period; estimates of the effect of the new service on traffic and revenues, including the traffic and revenue of other services; supporting workpapers for estimates of costs, traffic and revenue (para. 42)

c. Cost model to identify direct costs; must be the same model for all related services (para. 42)

d. If a risk premium is claimed, an on-the-record risk premium showing that consists of the following: (para. 43)

i. Explanation of the methodology employed to calculate the premium, the size of the risk premium, and the projected overall return for the service.

ii. Support material sufficient to evaluate accuracy of the premium calculation and the return projection

iii. The level of research and development expense incurred and projected; the level of marketing expense incurred and projected; the type and functions of any new technologies associated with the new venture; an explanation of the method used to project demand; any special elements of risk the carrier believes will justify the premium

e. Add appropriate overhead loadings; must file ratios of direct unit cost to unit investment and direct unit cost to unit price; no uniformity is required in the loadings; must justify methods and any deviation from the method selected (para. 44)

3. Other support/requirements:

a. Initial filing includes one switched lineside BSA and one switched trunkside BSA (paras. 13, 48)

b. Must not abolish Feature Groups until the initial BSEs and BSA elements are folded into price caps (para. 20)

c. BOCs must list BSEs that they intend to use in their enhanced service operations (para. 45)

d. Filed prices for unbundled versions of existing offerings must be less than or equal to existing prices (para. 48)

e. BSE rate structures must reasonably reflect the nature of underlying costs (para. 50)

f. Certify that all BSEs have been approved

II. BOC ONA Filings:
New BSEs That Have Not Previously Been Approved

A. Preliminary to Filing the Tariff

Waiver requirement: No waiver is required if the carrier is unbundling special access. With respect to switched access, BOCs that wish to implement "unbundling" of the local switching, transport, or information elements other than unbundling of a BSE will be required to obtain a Part 69 waiver.

Expedited Approval Process is used to review new BSEs that will be associated with a circuit-switched BSA and have not been previously approved (para. 14)

1. File a description of the BSE with the Bureau; unless otherwise specified, parties have 10 days to submit comments and the carrier has 5 days to reply

2. If the Bureau does not take action within 45 days, the BSE is automatically approved

3. If the Bureau acts within 45 days, approval is postponed indefinitely

Possible actions: Bureau requests additional information orU requires carrier to file a request for waiver

4. Waivers are resolved by order

B. Tariff Filing

1. Notice: 45 days' notice for additional new BSEs

2. Cost support: If the BSE is a new service, the cost support is the same as for a filing made for a BSE listed in an approved ONA plan; if the BSE is a restructured service, the requirements depend on the resolution of the Supplemental Notice in CC Docket Nos. 89-79 and 87-313 (paras. 74-75)

3. Other support/requirements:

a. BOCs must list BSEs they intend to use for their enhanced service operations (para. 45)

b. BSE rate structures must reasonably reflect the nature of underlying costs (para. 50)

III. BOC Annual Filings
Additional Requirements Due To ONA

A. Preliminary to Filing the Tariff

Not applicable

B. Tariff filing

1. Notice: 90 days

2. Cost support: Existing price cap rules apply

3. Other support/requirements:

a. Feature Groups are abolished when initial group of ONA services is incorporated into price cap indexes (para. 20)

b. Each BOC must indicate its own usage of each individual BSE expressed as a percentage of total demand for that BSE (para. 53)

IV. ONA Filings for Non-BOCs

A. Preliminary to Filing the Tariff

Waiver requirement: No waiver is required if the carrier is unbundling special access. LECs may also offer BSEs listed in approved ONA plans, or otherwise approved by the Commission. LECs that wish to implement an "unbundling" of the local switching, transport, or information elements other than unbundling of a BSE will have to obtain a Part 69 waiver. (para. 14)

Expedited Approval Process is used to review new BSEs that will be associated with a circuit-switched BSA and have not previously been approved. (para. 14)

1. File a description of the BSE with the Bureau; unless otherwise specified, parties have 10 days to submit comments, and the carrier has 5 days to reply

2. If the Bureau does not take action within 45 days, the BSE is automatically approved

3. If the Bureau acts within 45 days, approval is postponed indefinitely

Possible actions: Bureau requests additional information or requires carrier to file a request for waiver

4. Waivers are resolved by order

B. Tariff Filing

1. Notice: ONA filings will be on 45 days' notice.

2. Cost Support: Price cap carriers comply with price cap rules for new or restructured ONA services

Rate of return carriers follow existing rate of return requirements

3. Other support/requirements:

1. BSE rate structures must reasonably reflect the nature of underlying costs (para. 50)

2. LECs must list BSEs they intend to use in their enhanced service operations (para. 45)

C. Annual Filing

1. Notice: 90 days

2. Cost support: For price cap carriers, existing price cap rules apply, subject to the Commission's decision as a result of the Supplemental Notice in CC Docket Nos. 89-79 and 87-313 (paras. 74-75). Rate of return carriers follow existing rate of return cost support requirements.

3. Other support/requirements:

Each price cap LEC must indicate its own usage of each individual BSE expressed as a percentage of total demand for that BSE. (para 53)

V. Other New Service Filings For Price Cap LECs

A. Tariff Filing

1. Notice: 45 days

2. Cost support:

X3>a. Net revenue showing (paras. 39, 42)

b. Regardless of the cost model chosen, cost support must include the following information: a study containing a projection of costs for a representative 12 month period; estimates of the effect of the new service on traffic and revenues, including the traffic and revenue of other services; supporting workpapers for estimates of costs, traffic and revenue (para. 42)

c. Cost model to identify direct costs; must be the same model for all related services (para. 42)

d. If a risk premium is claimed, an on-the-record risk premium showing that consists of the following: (para. 43)

i. Explanation of the methodology employed to calculate the premium, the size of the risk premium, and the projected overall return for the service.

ii. Support material sufficient to evaluate accuracy of the premium calculation and the return projection

iii. The level of research and development expense incurred and projected; the level of marketing expense incurred and projected; the type and functions of any new technologies associated with the new venture; an explanation of the method used to project demand; any special elements of risk the carrier believes will justify the premium

e. Add appropriate overhead loadings; must file ratios of direct unit cost to unit investment and direct unit cost to unit price; no uniformity is required in theloadings; must justify methods and any deviation from the method selected (para. 44)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	**MM Docket No. 90-4**
Carriage of Television Broadcast Signals by Cable Television Systems	**MM Docket No. 84-1296**

REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: June 13, 1991; Released: July 12, 1991

Comment Date: September 25, 1991
Reply comment Date: October 25, 1991

By the Commission: Chairman Sikes issuing a separate statement.

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I. INTRODUCTION

1. This *Report and Order and Second Further Notice of Proposed Rule Making (Report and Order)* modifies the Commission rule that defines what constitutes "effective competition" to cable service. In the absence of effective competition, a franchising authority has the discretion to regulate the rates charged for basic cable service. Under these new rules, effective competition would exist and the franchising authority would not have the authority to regulate basic service rates if either of the following conditions are met: (1) six unduplicated over-the-air broadcast television signals are available in the entire cable community; or (2) an independently owned, competing multichannel video delivery service is available to 50 percent of the homes passed by the incumbent cable system and subscribed to by at least 10 percent of the homes passed by the alternative system within the incumbent cable system's service area. For those cable systems whose basic service rates are regulated by their franchising authorities, we will require that in setting or approving rates, franchising authorities allow cable operators to earn a fair return on investment. In addition, this action requests further comment on whether the lack of signal carriage requirements for cable television systems (*i.e.*, must carry rules) undermines the effective competition standard.

II. BACKGROUND

2. The Cable Communications Policy Act of 1984 (Cable Act) embodies a national policy to encourage the growth and development of cable television services, [1] setting forth guidelines to govern federal, state and local authorities' regulation of cable systems. The Cable Act was also drafted to assure that cable systems provide the widest possible diversity of information sources and services to the public, and that they are responsive to the needs and interests of the local communities they serve. [2]

3. Section 623 of the Cable Act permits, but does not require, franchising authorities to regulate basic cable service rates only in those situations where the cable system is not subject to "effective competition." The Cable Act and its legislative history are quite specific in defining "basic cable service" and provide that, where regulation of cable service is permitted, it is only the basic service that is subject to control.[3] The Cable Act [4] directed the Commission to define the circumstances in which a cable

[1] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[2] 47 U.S.C. § 521.

[3] 47 U.S.C. § 543. The Cable Act defines "basic cable service" as " *any* service tier which includes the retransmission of *local* television broadcast signals." (emphasis added) 47 U.S.C. § 522(2). The Commission is bound by this statutory definition and the Cable Act's allowance, in the absence of effective competition, of rate regulation of *only* those tiers of service which include local broadcast signals. *See* 47 U.S.C. § 543(b)(1). Under this definition, any tier that includes the "retransmission of local television broadcast signals," would be considered basic service. If a tier of service includes a local broadcast signal it may, in appropriate circumstances, be regulated. Significantly, a tier that does not itself include local broadcast signals, even if subscribers must "buy through" a tier containing retransmitted local broadcast signals to obtain it, is not subject to regulation. *Cf.* House Committee on Energy and Commerce, H. R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (1984 House Report) at 40. *See also American Civil Liberties Union v. FCC (ACLU)* , 823 F. 2d 1554, 1565 (D.C. Cir. 1987),*cert. denied*, 108 S. Ct. 1220 (1988).

[4] 47 U.S.C. § 543(b)(2)(A) and (b)(2)(B). The Cable Act grants the Commission only limited authority with respect to the

system is not subject to effective competition and to establish standards for the regulation of basic cable rates by local franchising authorities in such cases. In 1985, the Commission determined that the availability of three unduplicated over-the-air signals should be the appropriate test. [5] Section 623 of the Cable Act also requires that the Commission periodically review its regulations, taking into account developments in technology. [6] In light of this Congressional directive, we initiated this proceeding because we found that the nature of basic service had changed. [7]

4. The Commission initiated this proceeding to review its rules regarding the regulation of basic cable service rates in light of changed circumstances in the video marketplace since the three signal standard was adopted. [8] The primary purpose of the *Notice* was to examine whether the three signal standard remains valid and, if not, what would constitute a more appropriate standard. The resulting record led the Commission to believe that an effective competition standard based on three over-the-air broadcast signals no longer reflected the realities of the cable industry and the broader video marketplace. However, since the *Notice* did not seek comment on specific proposals to revise the rules, the Commission adopted a *Further Notice of Proposed Rule Making* (*Further Notice*) on December 13, 1990, [9] which proposed a multiple-option test for identifying effective competition. The *Further Notice* also requested comment on proposals to amend the standard for rate regulation by local franchising authorities in cable communities not subject to effective competition. [10]

III. DISCUSSION

A. Effective Competition Standard

5. The Cable Act requires the Commission to look at competition for the limited purpose of determining in what situations rate regulation of basic cable service may take place. [11] When the Commission adopted the three signal standard in 1985, the programming provided by basic cable service primarily consisted of retransmitted local, over-the-air broadcast television signals. Thus, we concluded that a standard based on the reception of terrestrial television signals would provide a reasonable benchmark for determining the presence of effective competition for basic cable service. [12] Based on the record developed in the relatively short time frame allotted by Congress to establish the effective competition standard, the Commission determined that three over-the-air broadcast signals would be sufficient to ensure that basic cable service did not become a source of market power for the cable operator. [13]

6. As stated in the *Notice*, we believed that a review of the standard is appropriate because basic cable service had become more than the retransmission of local broadcast signals and often included a wide range of programming services. [14] In the *Further Notice*, we concluded that this initial de termination was correct.[15] Since that time, press accounts report that some cable systems have reduced the size of their basic service package and moved some of the more costly program services to "expanded basic" tiers.[16] Cable systems clearly have the general right to move individual cable program services among tiers, [17] and they may understandably do so in their desire to find the optimal mix of program services and prices. As the costs of individual program services to cable operators change, they can be expected to add and delete program services from the basic package. In any event, in our Report to Congress on the state of the cable television industry last year, we found that availability of off-air broadcast television service is a good substitute for retransmitted broadcast signals and also offers some degree of competition to both broadcast-like as well as specialized basic cable programming services. [18] While broadcast television is not as good a substitute, however, for some programming such as exclusive sports and other events not available over-the-air, the services offering such events are precisely those most likely to be removed from basic tiers as a result of high costs.[19] That cable operators have the ability to remove such programming services from the basic tier -- and the evidence that many are doing so -- reaffirms

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regulation of cable television service rates. We have sought to use this limited authority to the maximum extent warranted by the statute.

[5] *See Report and Order* in MM Docket No. 84-1296, 50 FR 18637 (1985), *Memorandum Opinion and Order* in MM Docket No. 84-1296, 51 FR 21770 (1986). *See also Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988) adopted in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACLU, supra*. Two petitions for reconsideration of this action were filed and one was subsequently withdrawn. The remaining petition, filed by the City of Dubuque, Iowa (Dubuque), on June 15, 1988, concerns changes the city proposes that the Commission make in the measurement methods used to determine whether a signal is available in the cable community as well as changes in the cost reimbursement rule. We resolve this petition herein.

[6] 47 U.S.C. § 543(b)(3).

[7] *See* 47 U.S.C. § 543(b)(3). Given the speed with which the Commission was forced to act in this regard, the court in *ACLU* also anticipated that the Commission would monitor the effects of its regulations and make adjustments where circumstances so required. *See ACLU* at 1565.

[8] *Notice of Proposed Rule Making* (*Notice*) in MM Docket No. 90-4, 5 FCC Rcd 259 (1990).

[9] *Further Notice of Proposed Rule Making* in MM Docket No. 90-4, 6 FCC Rcd 208 (1991).

[10] Appendix A lists parties filing comments on the *Notice* and *Further Notice*. Issues in the *Notice*, not addressed in the *Further Notice*, have been incorporated in this *Report and Order*.

[11] *See* 1984 House Report at 66.

[12] *See Report and Order* in MM Docket No. 84-1296 at para. 98.

[13] *See Report and Order* in MM Docket No. 84-1296 at para. 99.

[14] *See Notice*, 5 FCC Rcd at 261.

[15] *See Further Notice*, 6 FCC Rcd at 209.

[16] We recognized the beginning of this trend in the *Further Notice* and observe that it is becoming more widespread. *See Further Notice*, FCC Rcd at 209, n. 21. *See, e.g., Broadcasting*, May 21, 1990, at 35-38, June 4, 1990, at 10, March 3, 1991, at 52 and April 15, 1991, at 10.

[17] *See Further Notice*, 6 FCC Rcd at 214.

[18] *See Report* in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) at 4995-4996. In our Report to Congress, we found that non-premium cable service was comprised of three types of programming: (1) retransmitted broadcast signals; (2) general interest basic cable networks such as USA Network and TNT; (3) specialized basic cable services such as CNN, BET, MTV and ESPN. *Ibid.* at 4995.

[19] *See Broadcasting*, March 12, 1990, at 29-31.

our view that a sufficient complement of over-the-air signals provides an acceptable competitive check on the ability of cable operators to raise their prices for basic cable service.

7. We found in the *Further Notice* that there are a number of ways to measure effective competition, but that no one factor, in isolation, can adequately measure the presence or absence of effective competition. We recognized that because cable market power might derive from a variety of circumstances,[20] a revised standard should set forth a number of alternative conditions, any one of which could reasonably be presumed to indicate the presence of effective competition. Thus, consistent with our goal to select a standard that struck an optimal balance between our statutory mandate to minimize regulation and our concern that cable systems not exert undue market power in the absence of substitutable services, the *Further Notice* set forth a proposed multiple-option effective competition standard.

8. The proposed standard included a signal/penetration test and a multichannel competitor test for determining whether a cable system faces effective competition in its local franchise area. In addition to these structural tests, we proposed a competitive behavior test that would determine whether a cable operator was operating in a competitive manner by offering basic cable service at a price, and perhaps in a quantity, corresponding to that in communities where competition is readily apparent under the structural tests and, as well, whether its level of service met specific customer service standards. Under the proposed standard, a cable system that met any of the three different tests would be presumed to face effective competition and would be exempt from rate regulation by its franchising authority. [21]

1. Signal Penetration Test

9. The signal/penetration component of this multiple-option effective competition standard proposed a threshold of at least six unduplicated overthe-air broadcast signals available in the cable community and cable penetration of less than 50 percent. Based on the analysis and recommendations submitted by the National Telecommunications and Information Administration (NTIA), [22] we determined that six over-the-air broadcast signals would indicate that there were sufficient competitive choices to provide consumers with effective competition to cable service and to ensure that cable operators act in a competitive manner. The penetration criterion would demonstrate that consumers could actually receive the over-the-air signals technically available in their communities and that such signals were adequate substitutes for the more specialized cable services. The *Further Notice* also requested comment regarding the measurement of signal availability and cable penetration.

10. *Comments.* NTIA and the Department of Justice (DOJ) support the six signals element of the signal/penetration component of the effective competition standard. DOJ concurs with NTIA's analysis that there is empirical evidence supporting the six unduplicated signals element of the test, *i.e.*, that there is some correlation between the presence of six signals and lower prices for basic service. DOJ also states, however, that the availability of six signals alone cannot be presumed to signify effective competition, because the availability of poor quality signals is unlikely to constrain cable's accrual and exercise of market power. The Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission (FTC) states that the only source of cable's market power in the provision of local signals on the basic tier would be its ability to provide improved reception of local broadcast signals. FTC suggests that an index be developed to measure market power in such antenna service in terms of the degree of similarity between cable and over-the-air reception quality, rather than an absolute number of over-the-air signals.

11. Most cable interests also support the broadcast signal component of the effective competition standard and argue that five or six signals is the appropriate threshold. The National Cable Television Association (NCTA), TeleCommunications (TCI) and Adelphia Communications Corporation *et al.* (Adelphia) cite the Dertouzos-Wildman and Crandall studies as providing a sound basis for a five signal standard. [23] Cox Cable Communications (Cox) also states that a six *unduplicated* signal standard is too restrictive. Cox cites the NTIA study showing that six signal markets, on average, have three network affiliates, one independent, one public broadcasting station and one duplicating network affiliate. Therefore, Cox states that for a six signal standard, the number of unduplicated signals should be five. NCTA argues that while the more regulatory six signal standard may be within the range of options supported by the record, it will have a severe impact on the Commission's goal of striking a balance between minimal regulation and curbing undue market power by cable.

12. Local franchising authorities, broadcasters and multichannel competitors generally argue that a six signal standard is inadequate. The City of New York, National League of Cities *et al.* (NLC) state that there is no evidence that six signals can exert meaningful competitive pressure on cable. It claims that none of the studies submitted in this proceeding is able to identify the precise number of signals needed to provide effective competition. NLC also argues that the inadequacy of the six signal standard is demonstrated by the fact that cable rates have soared in some cities where more than seven signals exist. Dubuque states that the record makes it abundantly clear that over-the-air signals alone do not constitute effective competition to basic cable. For example, Dubuque notes that cable rates in Los Angeles increased 67 percent be-

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[20] *See Further Notice*, 6 FCC Rcd at 210. *See also Report* in MM Docket No. 89-600, 5 FCC Rcd at 4995-4997 and 5053-5054.

[21] Although a number of cable interests propose that we exempt small systems from our effective competition standard and local rate regulation, we believe that the Commission lacks authority to create such an exemption. *See* n. 75 *infra*.

[22] *See* NTIA Comments, April 6, 1990 at 21-23 and Appendix A, Mark M. Bykowsky and Timothy Sloan," Competitive Effects of Broadcast Signals on the Price of Basic Service."

[23] NCTA Comments (filed April 6, 1990) submitted a study prepared by James N. Dertouzos and Stephen S. Wildman, entitled "Competitive Effects of Broadcast Signals on Cable." Tele-Communications, Inc. Comments (filed April 6, 1990) contained a study by Robert W. Crandall," Regulation, Competition and Cable Performance."

tween 1987 and 1990 even with 18 off-air signals. It also contends that such signals do not provide a comparable package of programming services and, thus, do not serve as an effective constraint on the price of basic cable. According to Dubuque, on average, basic service offers about four times as many channels as the proposed six signal standard. Based on the results of the NTIA study, Dubuque and NLC recommend an 11 signal standard. NCTA responds that although the 11 signal standard may be within the outer limits of the NTIA study, the effects of the first five or six signals vastly outweigh the effects of the next five or six.

13. The Association of Independent Television Stations (INTV) states that the six signal test should take into account the fact that the price impact of off-air signals may vary depending on the number of channels offered on the system. Therefore, INTV suggests the Commission adopt a proportional signal test such that effective competition will exist where the number of local broadcast signals constitute 25% to 30% of the cable system's channel capacity. The Wireless Cable Association (WCA) offers several examples in which competitive pricing does not occur until a competing multichannel provider appears, even in markets with six signals. WCA notes that the public's rejection of cable's "broadcast-only" tier offers empirical evidence that consumers subscribe to cable for the non-broadcast programming available only on cable.

14. The *Further Notice* also sought comment on a proposal to retain the existing procedures for measuring the availability of over-the-air signals in the cable community. In this regard, NLC states that a broadcast signal should be presumed to be available to a community if the entire community lies within 35 miles of the station's transmitter, and that such a presumption of availability should be rebuttable by a showing that 20% of the households cannot receive adequate reception from the station. The National Association of Broadcasters (NAB) and Dubuque would have Grade A signals as the measure of availability.

15. Dubuque and the Massachusetts Community Antenna Television Commission would delete reliance on "significantly viewed" signals. Dubuque argues that significantly viewed status cannot be a true measure of off-air signal availability in a community because it does not take into account the geographic dispersion of the households surveyed. In its petition for reconsideration in MM Docket No. 84-1296, Dubuque raises a similar concern. In that submission, Dubuque states that the results of a significant viewing study are biased in favor of demonstrating reception because they are based on surveys of homes that have off-the-air reception, which may not necessarily be characteristic of the community as a whole, particularly in communities with high cable penetration. Accordingly, in order to remove this statistical bias, Dubuque proposes that the Commission require that the audience survey be adjusted to reflect population densities.

16. Multnomah Cable Regulatory Commission and City of Wadsworth, Ohio (Multnomah), state that to the extent that the FCC relies on a standard based on signal availability, translators should not count. There can be significant variation in the actual quality and reliability of translators, particularly those located in distant areas, far from the station owner (and its engineers). Hence, it cannot be presumed that translators are the competitive equivalent of full power stations. Community Broadcasters Association, on the other hand, states that if the Commission has a signal standard it should require that the broadcast signal cover the entire cable community with a Grade B signal in order to be counted, including LPTV stations.

17. In the *Further Notice*, we proposed to include a penetration component as part of this test to determine whether the signals technically available in a cable community are actually received by consumers at an acceptable level of signal quality. Local jurisdictions endorse the penetration aspect of the effective competition standard. The City of San Diego, California (San Diego), believes that the penetration criterion is the critical element of the test because the six signal test alone does not adequately distinguish between what is technically available and what is in fact satisfactorily viewable. San Diego and other cities, however, recommend alternatives to the proposed 50% criterion ranging from 30% to 80%. NLC states that the potential disincentive effects associated with regulating systems with high penetration rates is adequately addressed by adopting a low penetration rate (30%). It is difficult to imagine, NLC argues, that any cable system will deliberately restrict subscriptions to below 30% in order to avoid rate regulation.

18. NCTA, NTIA, National Broadcasting Company (NBC) and cable networks assert that for cable operators whose penetration is anywhere near the 50% benchmark level, incentives exist to avoid "arbitrary municipal misregulation of rates." NCTA states that setting a low benchmark exacerbates the arbitrariness of using a penetration level to measure signal availability. NCTA cites DOJ comments that even relatively high penetration (70%) may not indicate market power.

19. In addition, Time Warner comments that penetration is more a measure of demographics than of signal availability and, therefore, the proposed standard would result in anomalous results for adjacent urban and suburban communities. The California Cable Television Association recommends that the penetration criterion be raised to a 70% threshold -- the number included in California's state standard for deregulation of cable television in 1979. Cable Operators and Associations (Cable Operators) claim that a 30% test would have devastating effects on newly constructed systems, imposing rate regulation on such systems when they are still in a development stage. Organization for the Protection of Small Rural Telephone Companies (OPASTCO) states that 50% is too high for rural areas. Tekstar Cable points to seasonal fluctuations in penetration as problematic.

20. While federal government commenters believe that it is appropriate to consider the quality of the over-the-air signals in the cable community, they oppose a penetration test. DOJ states that there is no logical relationship between penetration rates and the ability to accrue and exercise market power. High penetration may simply be due to superior competitive performance or to consumer demand for premium services for which basic service is a prerequisite. Low penetration may reflect a deliberate restriction of output related to the collection of monopoly rents, rather than the presence of competitive alternatives. Furthermore, DOJ argues that a penetration test might give a cable operator with monopoly power and a profit maximizing output slightly in excess of the Commission's cut-off point the incentive to reduce its penetration rate in anticipation that a small sacrifice of profits would still leave it better off than would price regulation. DOJ defers to the Commission for a better method for determining

signal quality and suggests that a further notice of proposed rule making may be appropriate to consider this matter. [24] The FTC also contends that it is difficult to infer the presence of market power from information on cable system penetration. It further believes that a penetration criterion would discourage systems from offering improved service which might increase penetration.

21. NTIA believes that the penetration factor is misguided because it is an unsatisfactory proxy for broadcast signal quality. Cable penetration is a function of not only broadcast signal quality, but also of prices of basic and pay services, household income, services offered and other factors. NTIA also states that the penetration factor would have additional undesirable effects in that it would increase the number of systems subject to rate regulation. [25] Moreover, NTIA submits an empirical analysis that shows higher rates, rather than the expected lower rates, in a sample of communities that have six or more signals and penetration rates below 50% compared to communities with six or more signals and penetration rates above 50%. Thus, a 50% penetration factor would have the anomalous effect of subjecting to regulation systems with lower rates while excusing from regulation some with higher rates. NTIA further notes that the Commission's rules for determining whether a signal is available within a community are already sensitive, to some extent, to potential deficiencies in broadcast signal quality. However, NTIA suggests that the Commission amend these procedures to permit a community to demonstrate that, although a station is engineered to place a predicted Grade B over the cable community, it does not provide a picture of acceptable quality. NTIA states that this case-by-case approach is a far more direct and less regulatory way to address the signal quality problem.

22. *Analysis.* The number of over-the-air broadcast signals required to provide effective competition to basic cable service must be sufficient to allow viewers adequate and significant programming choices. Further, the number of signals chosen is intended to prevent the basic tier offering from becoming a source of market power for the cable operator. Virtually all of the commenters agree that the existing three signal standard is an inadequate measure of effective competition to basic cable service. As the number of *free* (*i.e.*, nonsubsciption) broadcast signals in a market increases, however, these signals increasingly become an effective consumer alternative to the service available from cable on a *paid* (*i.e.*, subscription) basis over its basic tiers. Though cable interests support a five signal standard and franchising authorities as well as others support a number in excess of six, we continue to believe that a complement of six unduplicated signals is the appropriate signal availability threshold for defining effective competition. [26] Our selection of a six over-the-air signal standard is intended to be conservative enough to ensure a complement of signals adequate to provide effective competition to the signal retransmission function of the basic tier, yet not so conservative as to result in undue rate regulation. [27]

23. The study submitted by NCTA indicates that additional signals beyond five have no additional competitive effect on basic cable rates. As we stated earlier, however, this conclusion may not be correct because the study did not report the separate effects of adding each additional channel beyond six. [28] NTIA's study indicates that incremental over-the-air signals in excess of five continue to bring lower basic cable rates and NTIA's position is that six signals is the appropriate effective competition standard, striking the best balance between protecting subscribers and minimizing the costs of regulation. NLC reasons that the NTIA study supports an eleven signal effective competition standard. NLC's reasoning, however, fails to compare the limited benefits consumers may derive from the rate regulation of cable systems in communities that have many signals against the substantial costs of such regulation. Consequently, it fails to take into account the Commission's mandate under the Cable Act to "... minimize unnecessary regulation that would impose an undue economic burden on cable systems" [29] and thus not to detract from the growth and development of the cable industry. Under such direction, our policy determinations must not only protect the public from the exercise of market power by a cable system in the provision of basic service, but also minimize regulation that would impose an undue economic burden directly on cable systems and indirectly on the public. We conclude that a six signal standard best accommodates both goals. [30]

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[24] While DOJ notes that predicted Grade B status could be used as a precondition before signal quality can be assessed, it does not believe that the predicted Grade B contour or "significantly viewed" status satisfactorily addresses the "quality" issue.

[25] NTIA estimates that 52% of all cable systems serving 18% of all subscribers could be subject to regulation under a six signal standard. By adding a 50% penetration rate criterion, 84% of the systems and 85% of the subscribers could be subject to rate regulation. We note that these figures may underestimate the number of cable systems that would be affected by the proposed standard because NTIA counts all available broadcast signals, not just unduplicated signals, as we proposed.

[26] For purposes of this standard, an unduplicated signal will be one which does not simultaneously duplicate more than 50 percent of another signal's weekly prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n) of the rules. *See* 47 CFR § 76.5(n). We select this definition because duplicated programming is most apparent during prime time.

[27] We disagree with WCA that competitive pricing would only occur when a competitive multichannel system is available in the cable community. Empirical evidence submitted into the record of this proceeding discussed *infra* indicate that broadcast signals in sufficient numbers can constrain cable basic service rates.

[28] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5080. In addition, we note that NTIA states that the results of the NCTA study may not extend generally to the overall population of cable systems because the cable system data used in their analysis is highly skewed towards larger systems. NTIA states, further, that the explanatory power of their model is low despite the large number of explanatory variables. Finally, NTIA states that some of the models produce counter-intuitive results. The FTC also questions the model used in the NCTA study on the grounds that it includes the number of channels offered on the basic tier as an explanatory variable rather than an endogenous variable. Furthermore, they note that the NCTA model omits other endogenous determinants of cable prices, such as the number of subscribers. *See* FTC Comments of April 24, 1991, Appendix at 28 for further discussion of the "reduced form" equation for basic service prices.

[29] 47 U.S.C. § 521(6).

[30] The six signal standard we are adopting is consistent with the results of NTIA's study. We note, however, that we require

24. With respect to determining the availability of over-the-air signals in the cable community, we believe that we should continue to use the existing signal criteria to determine whether the six signal threshold has been met.[31] Thus, a cable system will be deemed to face effective competition if at least six unduplicated broadcast television signals are available over the entire cable community, although the same six signals need not provide service to the entire community. The *prima facie* standard of signal availability for full service stations will be based on predicted Grade B contours, as defined in Section 73.683 of the rules, or significantly viewed status in the cable community, pursuant to Sections 76.5(i), 76.54(b) and 76.54(c) of the rules. [32] In implementing the three signal standard, we have found this standard to be a reasonable approach for assessing whether a signal is available over-the-air in the cable community. Therefore, we do not believe that any changes to these measurement procedures are warranted.[33]

25. In reaffirming our decision to use this *prima facie* standard of signal availability, we considered a number of other measures of signal availability, including 35-mile zones and predicted Grade A contours, that commenters proposed in this proceeding.[34] We believe that the Grade B contour, which has long been used by the Commission to define the expected reach of a broadcast television station's signal, is the best measure for this purpose. We observe that persons living at the edge of a signal's predicted Grade B contour can, and do, take relatively simple measures to enhance their off-theair reception, such as installation of improved roof-top antennas or careful location and orientation of such antennas. Thus, we believe that the predicted Grade B contour is likely to approximate the area where a broadcast signal is receivable. Alternatively, we believe that a higher level standard, such as Grade A, significantly underestimates signal coverage and would therefore be unacceptable for determining signal availability. While the 35-mile zone is used by the Commission for other purposes, we also reject this standard for measuring effective competition. A standard based on mileage zones is considerably more rigid and less accurate than the Grade B contour as a predictor of the area over which a signal can be received. [35]

26. Moreover, we continue to believe that significant viewing status in the cable community is a reasonably accurate and reliable means to measure the availability of over-the-air signals based on their audience share in noncable households. [36] We also believe that the existing procedure is preferable to the approach advocated by Dubuque in its petition for reconsideration in MM Docket No. 84-1296. That methodology which would weight surveys by population density would inject a new, costly, burdensome and complicated element in the significant viewing standard that would not be needed in most instances in order to prepare a valid survey. Our rule already requires that such studies be performed by independent professional audience survey organizations. To place arbitrary limitations on their judgments with respect to an acceptable survey methodology, *ex ante*, would unreasonably intrude upon their professional expertise. Accordingly, we reject Dubuque's petition with respect to modifying the method for demonstrating significantly viewed status.

27. We also will continue to count all unduplicated over-the-air broadcast services available in the cable community, including: full service commercial stations, full service noncommercial stations, satellite stations and television translator stations. The inclusion of translator stations depends on both their coverage areas based on their predicted protected contours as specified in Section 74.707 of the rules and whether the translator does not retransmit a station's signal that is already counted toward the six signal complement. Translators are an important source of television service in certain areas and, thus, should not be ignored when measuring off-air signal availability. Translators bringing in distant signals are not unlike stations from other markets that are "significantly viewed" and counted under our effective competition criteria. Translators, therefore, should be similarly counted. Furthermore, since we are counting translator stations toward the six signal standard, we see no reason to exclude local low power television stations that meet the same requirements. Translators and low power stations have similar coverage patterns and differ only in the amount of program origination each may broadcast. Moreover, translators may become low power stations at any time and, as such, originate programming that can add to the quantity and diversity of programming available in the communities they serve. Therefore, low power television stations that meet the same coverage require-

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that six unduplicated signals must be available to the franchising community. This is a more conservative standard than a six signal requirement alone.

[31] *See Report and Order* in MM Docket No. 84-1296 at para. 107 and *Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd at 2619-2620.

[32] *See Second Report and Order* 3 FCC Rcd at 2625.

[33] The Commission's procedures for resolving disputes regarding the availability of broadcast signals in the cable community recognizes the significance of actual availability, rather than predicted availability. As described in paragraph 81 *infra*, the rules provide a means by which parties seeking to rebut the *prima facie* standard may demonstrate whether an over-the-air signal is or is not actually viewable in the cable community. We believe that these procedures are sufficient to address the concerns expressed by DOJ and NTIA regarding the need to ensure adequate signal quality.

[34] These same alternatives were previously considered when we adopted the three signal standard. *See Report and Order* in MM Docket No. 84-1296 at para. 107. *See also Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd at 2619.

[35] We also reject the approach suggested by INTV, which would deem a cable system subject to effective competition only if the number of local broadcast signals exceeds 25-30% of the system's channel capacity. This excessive standard would require that 25 over-the-air signals cover the service area of a 100 channel cable system, a non-existent situation in the real world. A neighboring system of only 12 channels would require the presence of only 3 over-the-air signals to escape regulation, leading to disparate regulatory results for adjacent cable systems and undue regulation.

[36] In the *Second Report and Order* in MM Docket No. 84-1296, we modified the significantly viewed standard for effective competition to require community, instead of county-wide showings, to increase the accuracy of such measurements in response to the court's concerns in *ACLU*. *See Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd at 2619-2620.

ments as translators and that do not duplicate another station already available in the cable community will also count toward the six signal complement. [37]

28. We initially recommended that a cable penetration criterion be considered along with the six signal complement as a means to address the "antenna service" source of cable market power. [38] After reviewing the record, we agree with DOJ and NTIA that no useful purpose would be served by subjecting additional cable systems to rate regulation where six signals are indeed available. We believe that a cable penetration figure is not a reliable indicator of either poor off-air signal quality or of cable market power. Cable penetration, as DOJ, NTIA and other commenters point out, is determined by a number of factors other than the quality of off-the-air signal reception. Price, quality of service, income, demographics, age of system and varying viewing tastes all have a significant impact on the demand for cable service and the resulting penetration in any given area. Commenters also point to numerous examples where basic cable rates do not vary directly with cable penetration levels and are, in fact, higher in some communities with low penetration than in communities with high penetration. [39] In these instances, a penetration standard would excuse from regulation those systems with low penetration but higher rates. We therefore believe that the adoption of a penetration standard would be inappropriate because this factor varies not only with television reception, but also with the divergent demand and tastes among television households.

29. We also note that a penetration requirement may be counterproductive. It could penalize those systems that have achieved high penetration through subscriber-sensitive marketing and quality service at a reasonable price. A penetration threshold also provides an incentive for cable systems to remain under the designated penetration rate, thus artificially interfering with cable marketing decisions. In this regard, we are concerned that such an incentive would discourage cable operators from upgrading the quality and level of services they currently provide. Accordingly, for the above reasons, we conclude that a cable penetration criterion in conjunction with the six signal standard is not in the public interest. Thus, consistent with our statutory mandate, the presence of at least six local broadcast signals in the cable community will now be deemed to constitute effective competition.

2. Multichannel Competitor Test

30. As discussed above, the presence of six over-the-air signals will be considered effective competition for basic cable service. In communities lacking six over-the-air signals, an incumbent cable system may also be subject to effective competition due to the presence of another multichannel provider that offers multiple channel options. Consequently, the second component of the proposed effective competition standard would consider the availability of a competing, independently owned, multichannel video delivery service in the cable community. [40] In order to determine whether the alternative provider is sufficiently "available" in the cable community, we proposed to require that at least 50 percent of the homes passed by the incumbent cable system be capable of receiving an alternative service. As part of this test, we further proposed a penetration criterion set at 10 percent or more to demonstrate that an alternative video provider offers service that consumers view as a substitute for the incumbent cable television system. We also proposed that availability and penetration of alternative video services situated in different sections of the franchise area could be added together to meet the thresholds. The *Further Notice* also requested comment regarding the measurement of availability and penetration.

31. *Comments.* Virtually all commenters support use of a multichannel competitor test, and indeed NAB, INTV, Dubuque, WCA and others argue that the existence of another multichannel provider is the *only* means of constraining cable rates to competitive levels. However, most commenters suggest that the Commission refine its proposed availability and penetration standards. First, commenters offer varying definitions of "multichannel competitors" to be included under the test. NTIA emphasizes that a multichannel competitor can only constrain basic cable rates if the consumer can realistically choose that system over the incumbent and both systems actively compete for business within the community. NTIA cautions that the Commission should define available multichannel choices on realistic rather than theoretical grounds. [41] Dubuque claims that a multichannel provider should be comparable in availability, demand for the service and minimum channel capacity. Cable systems and networks claim that live entertainment, sporting events, VCRs and videocassettes should also be considered available viewing options since they compete for audiences within the cable system's franchise area. [42] As an

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[37] Nothing in this action changes the secondary status of translator or low power stations.

[38] In the *Further Notice*, the Commission inferred that cable penetration would provide evidence of actual signal availability. The Commission also noted that while cable market power might be restrained in the presence of six signals and cable penetration less than 50%, cable penetration by itself would not accurately indicate the existence of effective competition. *Further Notice*, 3 FCC Rcd at 211.

[39] NTIA comments, February 14, 1991, at 12.

[40] Video delivery services that may be counted include: a competing cable system; multichannel, multipoint distribution systems (MMDS); satellite master antenna television systems (SMATVs); home satellite dishes (HSDs); and direct broadcast satellite services (DBS). Parties may also submit information, through the waiver process we adopt herein, about other video delivery services that should be counted for this multichannel competitor prong of our effective competition standard. *See* Section 76.33(a)(3)(iii) of the rules.

[41] NTIA cites an example from a survey of MMDS systems indicating that they place a signal throughout a community but choose not to market the service to homes passed by cable when terrain or building obstructions prevent the realistic reception of the service by those households. Dubuque affirms the limited reach and technical availability of terrestrial services such as MMDS and notes that satellite technologies such as DBS may not become available to the nation "upon launch."

[42] INTV claims that a substitution analysis should be required for determining multichannel competitors, especially for other audience seeking enterprises. DOJ encourages some measurement of the actual substitutability of channel packages since local programs, news, and network entertainment are offered only over local broadcast stations, which are not carried on some noncable multichannel systems. DOJ does not offer a particular measure, but says that the Commission might consider including the number or ratio of local channels carried by the incumbent and competing systems, or a similar measure of total channels.

extension of the multichannel competitor definition, NCTA and many cable systems request that the Commission incorporate "potential competitors" on the grounds that neighboring systems effectively constrain rates and service quality through the threat of possible entry even without an existing presence in the incumbent system's area. Similarly, the Community Antenna Television Association. (CATA) suggests extending the definition of multichannel competitors to include systems making substantial long term investments even without current penetration. However, NAB and NLC reply that a substantial presence in the market is necessary to constrain prices since a potential competitor faces lags prior to entry, if not barriers precluding entry, during which time the incumbent system may respond to deter the entry of new competitors.

32. Concerning the availability criteria, NTIA suggests that although the Commission's standard is reasonable, the "availability" definition could be strengthened by requiring that providers actively market their service to 50% of the community. Consumer agencies and local governments recommend at least 80% availability since a large portion of the community remains without a competitive alternative under the proposed 50% standard. Similarly, Time Warner is concerned that the 50% threshold could allow a competing system to "skim the cream" from the most dense and populated areas rather than building through the entire community. Dubuque says that the 50% threshold allows great possibility for price discrimination by the incumbent system under Section 623(f) of the Cable Act because franchising authorities are not required to prohibit the practice, particularly when cable systems act to meet competition. In addition, Dubuque shows that the proposed standards applied together could mean that only 5% (10% of 50%) of an incumbent system's community must select an alternative service in order to remove controls from the incumbent cable system. Accordingly, some consumer groups propose to resolve their concerns regarding the insufficient availability requirement by increasing the penetration threshold, with many suggesting 30% of the entire community.

33. Several commenters express concerns that inclusion of the penetration criterion is unwarranted. In its reply comments, NCTA contends that the penetration test is solely designed to show that a competitor is actually providing a service, which could be proven by any indication of penetration. The FTC argues that the use of a penetration criterion in this test might create an incentive for the incumbent cable operator to raise prices or lower quality to increase the market share of its competitors in order to avoid rate regulation. Many commenters [43] offer a practical concern that a competing system's subscriber information would be neither available from audits nor volunteered due to incentives to preserve regulatory burdens for the incumbent system. In addition, cable systems, USA Network and CATA object that the criterion penalizes successful operations preferred by consumers who choose not to subscribe to another system, thus causing low penetration levels for competitors.

34. The Small Business Association similarly notes that less dense areas would be unfairly regulated since they are generally unable to support multichannel competitors technologically or economically. [44] Furthermore, the Competitive Cable Association argues that penetration by a competing system is blocked by local authorities that grant exclusive franchises, and that franchising authorities should be permitted to regulate basic service rates only in communities with open franchising.

35. Regarding the measurement or counting of multichannel competitors within a community, NLC and some localities dispute the proposed aggregation of competitors and claim it will overstate the significance of multichannel alternatives. They contend that a single entity meeting the multichannel criteria is a greater threat to an incumbent system than a group of smaller competitors. WCA believes that effective competition is possible only when a single entity penetrates 15% of homes in the incumbent cable system's franchise area. NLC also recommends calculating the penetration standard as a percentage of all households in the community as opposed to all homes passed, while applying the criterion only to those systems that satisfy the availability requirement.

36. Finally, in the *Further Notice*, we sought comment on whether an appropriate definition of an "independently owned" multichannel competitor would be based on the existing attribution rules set forth in Section 76.501. Some commenters observe that the definition of an "independently owned service should be clarified to prevent any financial interest. According to the WCA, using Section 76.501 as proposed in the *Further Notice* would permit a local cable system to own 49.99% of a competing system's voting stock, thereby preventing a competitive check on rates. WCA suggests, rather, that the Commission adopt the cross-ownership rules for cable television companies and wireless cable and telephone companies. [45] The Consumer Federation of America suggests modelling cable attribution rules after cable-telco cross-ownership rules which prevent any affiliation beyond carrier-customer relationship.

37. *Analysis.* The Commission finds that despite the many conflicting interests in this proceeding, a significant majority of the parties support the inclusion of a multichannel competitor test. Most notably, NTIA and DOJ have concluded that some indication of the presence of multichannel competition to the incumbent cable system should be included as an alternative measure for establishing effective competition. The Commission believes that the following standards -- 50% availability among homes passed [46] by the incumbent cable system with at least 10% of all homes passed by the alternative system within the cable system's service area subscribing

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[43] Competitive Cable Association, Public Service Commission of The District of Columbia, Multnomah, Adelphia and Continental Cablevision.

[44] Many small cable systems recommend an exemption for systems below 1000 subscribers in order to prevent a bias against smaller and rural communities.

[45] *See* 47 CFR §§ 21.912, 63.54.

[46] "Homes passed" is defined as the number of homes to which cable service is currently available whether or not a given household subscribes to cable service. The base of "homes passed" is more appropriate for measuring the presence of an effective multichannel competitor as opposed to "all households in a community" since the larger measure includes some households that are not served by the incumbent cable system.

to an alternative service [47] -- are reasonable benchmarks for determining when a cable system faces effective competition from multichannel service providers.

38. The Commission emphasizes that, as proposed in the *Further Notice*, we will consider providers of a competing cable service, MMDS [48] , SMATV, HSD and DBS as multichannel competitors for purposes of applying the multichannel competitor test. We acknowledge that the proposed array of competing services may offer channel packages that differ from those of the incumbent cable system, yet we believe that these alternatives should be considered substitutes for basic cable service since they provide a variety of programming services with many of the characteristics of local stations, such as news, sports, movies, entertainment series and so forth. In addition, they:, provide for reception of local over-the-air stations. While we do not believe it necessary to include as an explicit condition of the standard that these competitors provide access to local broadcast signals, we emphasize that it is implicit in our analysis that access to such service is also present and not impeded. All evidence available to us indicates that this will be the case. For example, while MMDS systems typically do not redistribute local broadcast signals over their own channels, continued access to local broadcast signals is invariably integrated through circuitry or switching mechanisms into the MMDS service package. The same is true with the other existing frequency-using and wire-based multichannel competitors. Multichannel service providers operating in this fashion, if generally available and actually subscribed to by a significant number of consumers in the community, will truly provide a market constraint on the rates for basic cable service of more established cable multichannel service providers.

39. The Commission also concludes that the public interest would not be served by including VCRs, live entertainment, or "potential competitors" within the definition of multichannel alternatives. We continue to believe that while both VCRs and live entertainment offer some services provided by cable, their impact with respect to basic tier services is not significant enough to justify including them in our product market definition. [49] In particular, unlike cable service or other multichannel providers, they do not offer multiple channels of video programming directly to the home. Concerning "potential competitors", we understand that a neighboring multichannel provider could conceivably become a substitute service by expanding its service area. To determine whether a cable system faces effective competition, however, the viewing choices currently available to consumers of cable television within a local community are decisive because a household could not feasibly subscribe to a *potential* competitor. Furthermore, there is no reliable method for determining whether or when a "potential competitor" can become an actual competitor because technical and economic barriers to entry may exist that are unique to each area. Therefore, while the potential for competition may constrain a cable system's rates in some instances, it is not clear that "potential competition" will generally have this effect.

40. With respect to the proposed 50% availability criterion, we note that several commenters suggested a lower threshold, arguing that the "potential" for competition to the incumbent cable system is sufficient to restrain basic service rates. Others suggested a higher threshold, contending that the incumbent cable system's rates will be restrained in the entire franchise area only if the multichannel competitor is available to the vast majority of the homes passed by the cable system. Several commenters also specifically suggested that a higher standard would be necessary to prevent the possibility of price discrimination by local cable systems. The Commission continues to believe that the proposed criterion will sufficiently promote competitive behavior throughout the franchise area. Section 623(f) of the Cable Act explicitly empowers local franchising authorities to prohibit discrimination among customers of basic cable service. Where a franchising authority has determined not to extend the benefits of competitive pricing into areas of its community where an alternative service may not be available, any remaining occurrences of anti-competitive pricing behavior can be enforced more efficiently through antitrust mechanisms than through Commission action.

41. Some commenters expressed concern that the proposed 10% penetration criterion was too low, while others considered it entirely unwarranted. Again, we believe that the multichannel competitor test requires some indication of a real presence by an alternative provider in order to create a viewing choice for consumers and to warrant forgoing rate regulation. We agree that the availability of a service must be reinforced by some local distribution or marketing in order for the service to compete with a local cable service.[50] We conclude, therefore, that the 10% threshold can adequately address these concerns. The Commission believes that a higher penetration standard could be contrary to the public interest because it would increase the potential for penalizing successful local cable systems who retain subscribers, thereby preventing competing providers from accumulating substantial penetration into the local market. On this basis, we reject the suggestions of localities who requested greater penetration by competing services. Finally, it should be emphasized that in those instances where a franchising authority or cable operator is unable to obtain availability or penetration estimates from the alternative multichannel providers in order to determine whether effective competition exists, the Commission intends to exercise its legal authority to obtain the information necessary to make this determination.

42. We wish to clarify a number of matters regarding the calculation of availability and penetration of alter-

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[47] NLC expressed confusion regarding the portion of households against which the Commission intended to measure the proposed 10% penetration standard. Although NLC recommended a standard of all households in the community, we clarify that only those homes passed by both systems and thus actually able to choose between the incumbent cable system and a competing provider are the basis of this calculation.

[48] For the purposes of determining the availability of an MMDS provider, the Commission has established the protected contour for an MMDS system as a 15 mile (24.2 km) radius from the transmitter site. *See* 47 CFR § 21.902(d), (e).

[49] *See Report* in MM Docket 89-600, 5 FCC Rcd at 4997.

[50] The Commission addresses objections to applying the proposed penetration standard to small and rural cable communities in the discussion of Standards for Rate Regulation, *infra* n. 75.

native video delivery services. [51] We believe that it is appropriate to consider whether each home passed by the incumbent cable system has available to it a substitutable service and whether or not it chooses to subscribe to an alternative. We do not find it necessary to differentiate among alternative delivery services. Thus, to determine the availability of competing video services, [52] the number of homes passed by at least one of these alternative delivery services should be totalled. That figure should then be divided by the number of homes passed by the incumbent system and expressed as a percentage of those homes to determine the proportion of the incumbent system's service area served by the competing services combined. [53] Similarly, we believe that the penetration of alternative delivery services should be calculated by combining the number of subscribers to all available alternative services and expressing that figure as a percentage of homes passed by both an alternative video provider and the incumbent cable system. [54]

43. Finally, we also proposed to adopt the attribution criteria contained in Section 76.501 of the rules to define an "independently owned" multichannel competitor. Several commenters have requested that the Commission modify this proposed definition of "independently owned" services to exclu de the single majority shareholder provision of Section 76.501, Note 2(b), in order to prevent cable operators from obtaining any financial interest in the local multichannel competitor. We believe it is appropriate to adopt the attribution rules of Section 76.501 for purposes contained herein. We disagree with those commenters suggesting that we should exclude the single majority shareholder provision because, as we determined when we adopted these rules, when there is a single majority shareholder any other financial interests are passive. [55] We note that cable systems are already precluded from owning or taking financial interests in wireless cable operators meeting the comparatively strict conditions of Section 21.912.

3. Competitive Behavior Test

44. In the *Further Notice*, we stated that there may be competitive forces not identified by the proposed structural tests for effective competition that would have a price disciplining effect on cable services. Thus, we proposed a competitive behavior test that we believed could balance consumer interests in receiving cable service at reasonable rates and our desire to avoid unnecessary regulation in those situations where cable system rates have been restrained by market conditions. Under the first part of the proposed test, a cable system would have been deemed subject to effective competition if it offered a basic tier of service corresponding in rates, and perhaps in quantity, to specified benchmarks based on cable service in communities where effective competition is readily apparent. The second part of the proposed competitive behavior test would have required that cable systems seeking to meet this test certify to their local franchising authorities that they met certain customer service standards, such as NCTA's Recommended Cable Industry Customer Service Standards.

45. *Comments.* Some cable operators and a few local regulators favor a competitive behavior test as part of the effective competition standard. TCI, Time Warner and other MSOs state that this proposal would create incentives for cable operators to maintain low rates and would give them the option to avoid excessive and/or inconsistent local rate regulation. NCTA and other cable interests also believe that this test is permissible under the Cable Act. NTIA and others find the proposal appealing from a policy perspective, but believe that it is unworkable from a practical standpoint. FTC and others state that a principal disadvantage of the proposed test is its reliance on behavior in "competitive" markets under structural tests which may be flawed. FTC further believes there may be legal impediments to the proposal. DOJ also questions the legality of this test. Moreover, DOJ finds it unsound and believes that it would be difficult to implement because cable price may not reflect market power. NAB, many local franchising authorities and several alternative video providers oppose this test. They contend that it will effectively substitute federal rate regulation for local regulation in contravention of the Cable Act. They further believe that it is unreasonable to assume that a cable system that faces no visible competition is acting as if it were subject to effective competition solely on a comparison with cable rates in other communities.

46. The *Further Notice* proposed to base permanent benchmarks for this test on information from systems meeting the structural tests and several alternative transitional behavioral standards that could be used until such data become available. With respect to the appropriate benchmarks, either permanent or transitional, the majority of commenters are concerned with the manner in which they would be specified. NTIA, DOJ, NCTA, many cable operators and a few franchising authorities argue that no single national benchmark can take into account differences among cable system and community characteristics, including size, demographic, geographic and cost differences. In addition, CATA, some cable operators and a few municipalities argue that the benchmarks need to be numerous and flexible to allow comparisons among similarly situated systems.

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[51] Parties may obtain information regarding alternative multichannel video delivery services from publicly available sources, from the operator directly or from specifically undertaken audits.

[52] DBS will be considered to be available to the entire United States when any one DBS licensee begins operation.

[53] To meet the availability criterion of this test, the resulting value must be at least 50 percent.

[54] In order to meet the required penetration criterion of this test, the result of this calculation must be at least 10 percent. In addition, we believe that it is reasonable to use accepted industry practice with respect to bulk rate subscribers. Under this procedure, subscriber counts are adjusted for bulk rate subscriptions by dividing the total amount billed to such subscribers by the usual rate. For example, if a cable system charges $10 for basic service and a 200-unit apartment is billed $500, then it would count as 50 subscribers absent clear evidence that a different number of individual apartments receive cable service. We believe that this methodology also should be applied when calculating the number of subscribers to other video delivery services for the penetration criterion.

[55] *See Report and Order* in Docket No. 20521, 97 FCC 2d 997 (1984) at 1008-1009.

47. With respect to the proposal to include customer service standards as part of the competitive behavior test, most franchising authorities support such standards as long as they are strengthened and the Commission makes clear that they represent federal minimums (*i.e.*, do not preempt statutory authority to impose stronger customer service protections in franchise agreements, local ordinances, and state legislation or regulations). Cable interests, including NCTA and cable operators, generally oppose this proposal as too burdensome and argue that, in any case, customer service issues can best be addressed and enforced as part of a franchise agreement with a municipality. Continental Cablevision supports the Commission's customer service standards proposal, however, it suggests slight modifications.

48. *Analysis.* After analyzing the record regarding the proposed competitive behavior test, we have decided not to include it as a component of our effective competition standard.[56] While we continue to believe that cable operators whose basic service rates appear to be competitively constrained should not be subject to unnecessary regulation, we find that it would be difficult to establish benchmarks, either for a permanent test or on a transitional basis, that would objectively measure whether a cable system is operating in a competitive manner. We concur with the majority of commenters who observe that basic service rates reflect a multitude of factors depending on the characteristics of the cable system and its community. These include system size and offerings as well as geographic, regulatory and business factors which may differ locally or from system to system in the same area. It is also unlikely that there is a single competitive rate for any complement of cable service or one average per-channel price that consistently reflects competitive behavior because the cost of providing basic service differs among cable systems. [57] These various costs, such as programming, [58] plant, franchisefees and access obligations, reflect local market conditions and the diversity of cable service offerings intended to meet local consumer demand. Thus, we concede that we have not overcome the practical problems associated with establishing a competitive behavior test that would meet the legislative directive to develop objective nationwide criteria that are readily applicable on a community-by-community basis. [59] Accordingly, we will not adopt a competitive behavior test. [60]

B. Standards for Rate Regulation

49. In the Cable Act, Congress also required the Commission to establish standards applicable to regulation of basic cable service rates by local franchising authorities for cable systems not subject to effective competition as defined by the Commission. [61] The current rules include specific procedural requirements, but not substantive standards. In the *Notice* we requested comment on the rules, noting in particular our interest in avoiding abuse of the franchise power by municipalities. [62] Later in the *Further Notice* we sought additional comment (1) on the procedural requirements, and (2) on a general substantive standard that would require local franchising authorities to take into account certain costs when acting upon rate requests. [63]

1. Procedural Requirements

50. Currently, we require that any franchising authority that exercises its right to establish rates for basic cable service (1) give formal notice to24the public; (2) provide an opportunity for interested parties to make their views known; and (3) make a formal statement, including a

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[56] Several commenters suggest ways to modify the competitive behavior test. For example, Southwest Missouri Cable TV, Inc., *et al*, (the Independent Small Cable Operators) state that the Commission's competitive behavior test should be guided by the competition theories and legal precepts summarized by Areeda & Turner, *i.e.*, substantial market power may reasonably be presumed to exist from the following: 1) the firm's market share has exceeded 75% for five years or more; or 2) prices have exceeded average variable cost by 50% or more, or return on investment has exceeded cost of capital by 50% or more during this same period (citing Areeda & Turner, *Antitrust Law* (1978) at Section 803). Based on this the commenter suggests if a cable system fails the structural tests, the municipality should be precluded from regulating rates until the Commission has determined that there is not effective competition in the market. The cable operator would have the burden of proving to the Commission that its rates were subject to effective competition. The operator would be able to meet this burden by showing that its rates were similar to similarly situated, independently owned systems in the area. The commenter states this is an appropriate test because, absent collusion, economic theory suggests that where prices among competitors are similar, there exists evidence of competition. We reject this proposal, first, because we believe that application of the effective competition standard should be at the local level and not require prior Commission action on a case-by-case basis, and, second, because we believe the competition rationale for the proposal is flawed. As we stated in the *Report* to Congress, cable systems in different areas do not compete with each other for subscribers, and thus do not provide an appropriate competitive benchmark, as proposed by the commenter. *See Report* in MM Docket No. 89-600 at 4994. Other commenters suggest various other competitive behavior standards, which we believe may also have problems. Since we have declined to adopt the competitive behavior test in any form, we have not specified our concerns with each proposal.

[57] The Commission proposed the competitive behavior test based on its belief that there may be factors not recognized by our structural tests that would constrain a cable operator's basic service rate. It was not our intent to establish benchmarks that would have supplanted local regulatory authority with national regulation.

[58] For example, we note that two systems carrying the same number of nonbroadcast services on their basic tier would not necessarily have the same programming costs since cable operators pay different wholesale prices for the different services. Even cable operators offering the same complement of signals may have different costs since these costs may be negotiated between cable operator and program supplier.

[59] *See* 1984 House Report at 66.

[60] Because we reject this component of the proposed effective competition standard on policy grounds, we find it unnecessary to address the legal issues associated with its previously proposed adoption. We also find it unnecessary to address the merits of the customer service standards included in the proposed test. However, we note that franchising authorities have the ability to adopt and enforce customer service standards under Section 632(a)(1) of the Cable Act. 47 U.S.C. § 552(a)(1).

[61] *See* 47 U.S.C. at § 543(b). The Commission is required to review periodically such regulations, taking into account developments in technology, and to amend the regulations to the extent necessary. *Id.*

[62] *See Notice*, 5 FCC Rcd at 263-264.

[63] *See Further Notice*, 6 FCC Rcd at 213-214.

summary explanation, when a decision is made. [64] In the *Notice* we proposed to retain these procedural requirements, but nevertheless requested comment on their retention and sought proposals for additional administrative requirements deemed beneficial by parties. Then in the *Further Notice* we sought additional comment on the procedural requirements.

51. *Comments.* No party disagrees with our preliminary conclusion announced in the *Notice* and repeated in the *Further Notice* that the existing procedural regulations are desirable and should be retained. A number of cable interests recommend that we add to Section 76.33(b) a requirement that if a franchising authority denies a requested rate increase, it issue a written decision that at a minimum addresses the relevant cost and profit factors considered and state the reasons why the increase was not allowed. [65] Such a statement is viewed as ensuring that the relevant substantive factors were addressed by the franchising authority and as facilitating review of the decision. One cable party, TCI, requested that all decisions on requests for basic increases and the reasons therefore be stated in writing. [66]

52. *Analysis.* Currently, we require in Section 76.33(b) that franchising authorities make a formal statement that includes a summary explanation when they rule on a cable rate matter. We agree with commenters, however, that requiring disclosure of the relevant factors considered and the basis for the final determination in all ratemaking proceedings is a reasonable and desirable addition to our procedural requirements. Any such statement need not be lengthy or complex. It need only set forth the factors considered and reasoning applied to the relevant issues that resulted in the decision, including those factors and issues that we adopt today as substantive rate standards. [67]

53. While some parties may interpret the existing requirement as compelling an explanation of the factors and analysis underlying a franchising authority's rate-making decisions, in view of the substantive factors that we are adopting for the first time today we will amend our regulation to explicitly require a written statement that explains the decision. We balanced the importance of this requirement, which we envision would require only a short report in all but the largest and most complicated proceedings, against the burden on franchising authorities of producing even a short report and conclude that this requirement will both ensure that local authorities are cognizant of and apply the substantive standards we adopt and that they will produce a clear explanation for their decisions that will facilitate their own reconsideration or judicial appeal if necessary. Finally, we believe that to impose such a reasonable requirement only when requested rates are denied will not ensure that the appropriate factors are weighed in all proceedings. We also take note that in some proceedings there may appear parties that oppose certain rate increases that the franchising authority grants. Establishing this requirement for all ratemaking proceedings will thus facilitate review when rate increases are granted as well as when they are denied.

2. Rate-Setting Standards

54. When promulgating the original regulations pursuant to the Cable Act, the Commission considered but ultimately declined to adopt substantive ratemaking standards in implementing its authority under Section 623(b)(2)(B). [68] Consequently, under the existing rules local franchising authorities exercise discretion that is governed by the statute itself when determining the appropriate basic service rate for cable systems that do not face effective competition. [69] In the *Notice*, we discussed establishing accounting standards and reinstituting financial reporting requirements, as well as adopting a specific rate-making methodology. After receiving comment on these and additional proposals, in the *Further Notice*, we proposed instead a "fair return" standard that, in addition to a reasonable profit, would take into account capital, [70] programming and labor costs, as well as costs attributable to obtaining and retransmitting signals carried on the basic tier and the cost of any requirements made by the franchising authority that do not relate directly to provision of cable service. We explicitly proposed not to adopt any particular rate-setting methodology to implement this standard, finding that reliance upon local communities to determine or approve specific rates is appropriate because each cable system operates under its own franchise agreement and is subject to different costs. Finally, we proposed that disputes in applying this standard be directly appealable to the courts rather than to this Commission, given the different laws and agreements that would be applicable in each specific case.

55. *Comments.* Generally, cable interests support the concept of uniform federal standards to minimize politically based decisions by local communities and to assist the sometimes less-expert local authorities in determining the factors appropriate to consider. Most, but not all, local community commenters oppose our adoption of substantive standards, arguing that wide latitude is necessary for them to take into account special local factors. The communities also emphasize that any such standards must not contravene Cable Act provisions that empower only franchising authorities to actually regulate rates, and that detailed substantive standards run the risk of usurping or preempting this authority. Finally, local communities state that there already are in place adequate remedies to address any local abuse. [71]

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[64] 47 CFR §76.33(b). In addition, Section 643(d) of the Cable Act, 47 U.S.C. § 543(d), states that any rate increase request upon which the franchising authority does not act within 180 days after receipt is deemed granted unless the time period is extended by mutual agreement.

[65] *See, e.g.*, NCTA comments at 52.

[66] TCI comments at 35, n. 15.

[67] See paragraphs 59-67,*infra*.

[68] 47 U.S.C. § 543(b)(2)(B).

[69] The Cable Act provides that a cable system subject to rate regulation may increase its basic service rates up to five percent per year without franchising authority approval. 47 U.S.C. § 543(e)(1).

[70] While our *Further Notice* also itemized construction costs, we believe this component is subsumed in our itemization of capital costs.

[71] Referencing 47 CFR §§ 76.7, 76.33. Section 76.7 provides that any interested person, including a cable system operator, may petition the Commission for special relief to waive any of the cable rules, impose additional or different requirements, or rule on a specific complaint or disputed question. Section 76.33 cites

56. In considering exactly what should constitute our substantive standard, however, our "fair return" proposal was opposed generally by both cable interests and local franchising authorities, but for different reasons. Cable interests generally argue for what they consider to be a more streamlined proceeding that would guarantee recovery of increased costs and profits, whereas local communities argue for continued flexibility to consider additional local factors. Cable interests contend that the terms "fair" return and "reasonable" profits are vague, and therefore effectively would leave the determination of reasonableness to local officials who lack the necessary skills and tools to make such determinations. This complete control over the rates would, they argue, permit the inclusion of undesirable political considerations. Cable interests also argue that the proposed standard's terms fail to account for the value of increased channel capacity, investment in new cable program services and improvements to existing program services. Finally, cable interests make two legal arguments against the proposal: the first, posited by NCTA and other cable interests, is that the proposed "fair return" proposal is in all but name a form of rate-of-return regulation that would constitute the common carrier regulation of cable that is expressly prohibited by Section 641(c) of the Cable Act; and the second, argued by CATA and referenced by several others, is that any rate regulation of cable violates First Amendment protections accorded cable distribution of programming.

57. As an alternative to our "fair return" proposal, NCTA and others urge adoption of a regulatory presumption that any increase in documented annual costs for service on the regulated tier(s) above the five percent statutory annual automatic increase is reasonable and that a commensurate rate increase should be permitted. In making this argument, they argue that such a passthrough presumption is distinguishable from an automatic passthrough provision promulgated by the Commission in 1985 but struck down by the U.S. Court of Appeals for the D.C. Circuit.

58. Finally, we proposed in the *Further Notice* that appeal rights lie directly with the courts. Some parties object on the basis that this Commission, rather the courts, has the particular expertise to best resolve disputes concerning franchise agreements and the setting of rates by the franchising authorities. Others add that resolution of disputes by this Commission is desirable to assure uniform application of our standards and the Cable Act provisions. On the other side of the issue, parties argue that cases appealed to this Commission would in turn be appealable to the courts, and therefore direct appeal rights would eliminate an unnecessary layer of review and be less burdensome administratively; that direct judicial review would be consistent with appeals of other franchise decisions under the Cable Act; that this Commission has no special expertise in applying local law to franchise agreements; and that in other contexts courts directly review rate decisions and there is no evidence that suggests that confusion or other problems have resulted.

59. *Analysis.* In conjunction with adoption of the new standard for effective competition, we believe it desirable to adopt substantive standards to guide franchising authorities in setting rates.[72] There is ample evidence in the record that justifies and reinforces our concern that substantive standards are necessary to avoid recurrence of the past abuses of the ratemaking power.[73] The "fair return" on investment standard we adopt takes into account reasonable profits, capital, basic cable programming, customer service, labor and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, as well as changes in such costs and the cost of any requirements made by the franchising authority that do not relate directly to provision of cable service.[74] Of course, the automatic five percent annual increase would come into play before any franchising authority would become involved in rate regulation. Thereafter, our standards would apply to all franchising authority rate determinations.[75]

Section 76.7 in specifically providing that any party may petition the Commission for relief from, *inter alia*, the procedural standards for rate regulation discussed *supra*.

[72] The comments of the Puerto Rico Cable Television Association indicate that recently the Public Service Commission in Puerto Rico put into effect comprehensive cable rate regulation of all levels of cable service based on the mistaken belief that this proceeding would alter federal policy and allow rate regulation of all services offered by every cable system. In those situations where rate regulation is imposed under the new effective competition test, it is important to delineate what is and what is not included in the definition of basic service. Basic service includes not only the recurring monthly charge for those tiers of service that include local broadcast signals, but also the cost to provide the equipment necessary to receive the service and the charge for original or downgrade installation to obtain basic service. On the other hand, certain charges are clearly not included in the regulation of basic service, such as expanded tiers, pay channels and installation and equipment needed to receive such non-basic services. Regulation of these charges is preempted by the Commission's policy and the Cable Act.

[73] Cable interests contend that, prior to the Cable Act, local rate regulators acted arbitrarily and based their rate-making decisions on factors unrelated to the cost of providing cable service. *See, e.g.*, NCTA comments at 48-50; Adelphia comments at 38-39.

[74] We believe that it is reasonable to allow cable operators to charge to cable subscribers all costs associated with meeting the terms of the franchising agreement, whether or not such costs are directly related to the provision of cable service. A cable operator's ability to be the provider of cable service in a community hinges upon its fulfilling the franchise agreement. Moreover, the franchising authority has the ability to control such costs.

[75] A number of cable interests propose that we exempt from the rate-making requirements those systems that serve a small subscriber base, such as 1000 or 3500 subscribers, 30 or fewer subscribers per installed cable mile, or systems with less than $7.5 million gross revenue. They argue that the rate-making requirements would disproportionately burden such small systems with administrative costs, would discourage service to low-profit rural areas, and that the requirements are not needed because of the generally low profit margins of such small systems. As we interpret the Cable Act, however, the Commission lacks the authority to create a small system exemption. We make no decision in this proceeding regarding the Commission's authority to fashion different substantive standards for small systems pursuant to Section 623(b)(2)(B), which might provide a means of addressing legitimate small system concerns not inconsistent with the Cable Act. *See* 47 U.S.C. § 623(b)(2)(B).

60. Arguing against adoption of our "fair return" on investment proposal, a number of parties address the statutory provisions in their comments. Franchising authorities state that the fair rate of return proposal may impinge on the exclusive empowerment of local franchising authorities to set rates. Cable interests argue that the proposal is in all but name a form of rate-ofreturn regulation that would constitute the common carrier regulation of cable prohibited by the Cable Act. We have examined these arguments, and find no merit to either. As to the exclusive power of local communities to regulate cable rates, we note that our proposal establishes a generally applicable standard, the sort explicitly authorized by the Cable Act. [76] Our proposal would not regulate actual cable rates in any instance, either directly or indirectly. The authority of the local franchising authorities to set cable rates conferred by the Cable Act is explicitly conditioned on the standards that the Cable Act authorizes this Commission to establish. Applying general rules of statutory construction to the provisions at issue requires that we interpret the provisions in a manner that gives effect to all of the Cable Act's provisions. Although there is little legislative history to clarify the scope of our power to set rate-making standards, the plain meaning of the statute's provisions, both individually and read as a whole, clearly indicate that Congress intended to convey standards-setting authority for local cable rate regulation to this Commission.

61. The concern of cable interests that our proposal constitutes common carrier regulation is similarly misplaced. The proposal establishes specific standards that franchising authorities are to consider, but stops well short of specifying a methodology for application, the other factors that can be cognizable before the franchising authority, how accounts should be kept and reported (upon which allocation of allowable costs depends), or even what in this Commission's belief would constitute an appropriate fair return. It does not impose or authorize rate-of-return regulation or an obligation to serve all customers indifferently, which Congress intended to proscribe under Section 623. [77] Rather, this proposal is an attempt to establish clear standards that franchising authorities must consider when exercising their rate-making function authorized by the Cable Act.

62. The objections to our rate-making proposal based upon First Amendment protections accorded cable fail for equally clear reasons. First, without regard to the constitutionality of rate-setting for cable, our general standards do not constitute rate-setting in any sense. The actual function of rate-making clearly will lie with the local franchising authorities and not with us. But we are constrained to note, at least parenthetically, that the Supreme Court has consistently held that regulation specifically crafted to attain a substantial government interest, and content-neutral both on its face and in application, does not violate the First Amendment. In particular, the *Grosjean* and *Minneapolis Star* cases cited by CATA stand not for the proposition that governmental rate-making applied to communications media violates the First Amendment, but rather, that unjustified *selective* or *differential taxation* of newspapers constitutes an unconstitutional restraint. [78] That this is the rationale of these cases was clarified and reaffirmed by the Supreme Court recently in the context of general taxation of cable in *Leathers v. Medlock*. [79]

63. We view the "fair return" on investment proposal as simultaneously assisting the franchising authorities in determining the factors appropriate to consider when setting cable rates, preserving their control over the cable rates in their communities, and providing substantial flexibility for those communities to consider the potential plethora of additional factors that also might be relevant to setting rates. Even if we did not establish this standard, we believe that many franchising authorities would consider these same factors. Our requirements, crafted to promote the cable policy enacted by Congress, merely ensure that such relevant factors will receive their due consideration and that a reasoned explanation for a rate decision will be issued.

64. As an alternative to our "fair return" approach, Time Warner, NCTA and others propose that we permit automatic pass-through of documented annual cost increases for service on the regulated tier(s) that exceed the five "percent statutory automatic increase. [80] This proposal differs from one adopted by the Commission but struck down by the U. S. Court of Appeals for the D.C. Circuit [81] only insofar as the earlier provision provided for automatic passthrough of certain cost increases without regard to the statutory five percent pass-through. Thus, we are unconvinced that this proposal avoids the infirmity the court found to exist in the earlier provision. The court held that such a provision constitutes direct regulation of the permissible amount of a rate increase and is inconsistent with Section 623's explicit denial of cable ratemaking authority to all federal agencies. In addition, our adoption of such a provision would be functionally equivalent to amending the five percent cap to automatic rate passthroughs enacted by Congress – an amendment exclusively within the power of Congress, not this Commission.

65. On the other hand, we find that it would be consistent with *ACLU* and our authority under the Cable Act to adopt a *rebuttable presumption* standard (rather than an automatic pass-through) concerning the reasonableness of certain costs. Under this evidentiary standard, in addition to the automatic statutory pass-through, franchising officials shall presume the reasonableness of documented increases in those basic cable cost factors itemized in the "fair return" on investment standard adopted above. Under this standard, local rate regulators will retain the discretion to deny proposed rate increases even if they fall within the presumption. They will be

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[76] Section 623 of the Cable Act, 47 U.S.C. § 543.

[77] 1984 House Report at 60.

[78] *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Cf. U.S. v. O'Brien*, 391 U.S. 367 at 377 (1968) (establishing a balancing test for First Amendment analysis of media regulation, to whit, that government regulation is justified if (1) within the constitutional power of government, (2) it furthers an important or substantial government interest, (3) it is unrelated to the suppression of free expression, and (4) the incidental restriction on First Amendment freedoms is no greater than essential to furtherance of that interest); *See also Associated Press v. U.S.*, 326 U.S. 1 (1945), the seminal case in which the Supreme Court upheld application of nondiscriminatory economic regulation (the antitrust laws) to an activity that clearly involved communications functions.

[79] U.S. Supreme Court, Nos. 90-29, 90-38, slip opinion decided April 16, 1991.

[80] *See e.g.*, Time Warner comments at 51.

[81] *See ACLU* at 1570-1571.

required to provide substantial written evidence, however, supporting any decision to deny recovery of *bona fide*, documented increases in these itemized costs of providing basic cable service. This evidentiary standard constitutes neither "direct regulation of the permissible amount of a rate increase" or an "automatic pass-through", and it therefore does not suffer from the flaws that led the court to strike the Commission's prior pass-through rule. [82] Rather, the establishment of an evidentiary standard for certain rate increase proposals simply gives meaning to our written explanation requirement as applied where a cable operator has made a *prima facie* showing in support of a proposed rate increase. As such, this approach falls squarely within our authority -- indeed, our mandate -- to establish standards for rate regulation. [83]

66. We also recommend that state legislatures consider enacting laws authorizing state public utility commissions (PUCs) to be franchising authorities empowered to regulate basic service rates for the cable systems in their states. Some parties state that local communities, especially the smaller and rural ones, do not have the resources nor expertise to engage in well-reasoned and fair rate-making pursuant to our standards. State public utility commissions normally engage in rate-making for a number of different regulated industries and generally maintain professional staff with expertise in these matters, and therefore states may consider whether this authority is better exercised by their state PUC or equivalent. The legislative history of the Cable Act demonstrates Congressional intent to establish a uniform federal policy for the regulation of subscriber rates by franchising authorities, and expressly provided that a franchising authority may include a state governmental entity. [84]

67. Finally, we conclude that appeal rights should lie directly with the courts. This is especially appropriate in this instance because of the uniqueness of each local franchise agreement and the local law that must be applied to these agreements. This also is consistent with the treatment of appeals from other franchise decisions under the Cable Act. [85] In addition, by providing for direct judicial review, we are preventing the administrative burden of requiring appeal to the Commission first. We note that in a number of other contexts the courts already review rate decisions directly and that there is no evidence that suggests that this direct review has resulted in confusion or other problems.

3. Uniform System of Accounts

68. The *Notice* also sought comment on the establishment of a uniform system of accounts for cable systems.

69. *Comments.* With respect to the establishment of a uniform system of accounts for cable systems similar to Part 32 of the Commission's rules for the telephone industry, several commenters, representing franchising authorities and consumers, state that a uniform accounting system would create a standard basis for evaluating cable systems throughout the country and be useful for determining reasonable cable rates. They believe that it would eliminate the problems associated with the use of different accounting systems by different cable systems and the cost of tailoring financial reports to the requirements of different regulators throughout the country.

70. NCTA and several cable operators object to the adoption of accounting standard requirements because they would impose substantial burdens on cable operators with no assurance of any significant countervailing benefits. A number of cable interests also contend that it is unclear how the benefits of accounting standards would outweigh compliance costs which would be incurred by cable operators and regulatory bodies. [86]

71. *Analysis.* With respect to the proposal to adopt accounting standards, we are not convinced that the additional burden that would be imposed on cable operators could be justified on the basis of the limited benefits that may be derived from such requirements. In particular, parties supporting the establishment of a uniform system of accounts for cable systems have not provided sufficient information to indicate how such a system of accounts would assist franchising authorities undertaking the rate regulation function. [87] Accordingly, we will not adopt any additional requirements related to the regulation of basic cable rates.

C. Implementation of the Rules

1. Forum for the Determination of the Existence of Effective Competition

72. Based on the comments submitted in response to the *Notice*, in the *Further Notice* we proposed to delegate to the franchising authority in the first instance the authority to determine whether a cable system meets the new effective competition standard adopted in this proceeding. We also proposed to provide for direct review of such determinations by this Commission, via the provision of Section 76.33(c) of the rules. [88] In addition, the *Further Notice* sought comment regarding standards for determining the presence of broadcast signals in conjunction with requests for waivers of the *prima facie* showing of the existence of effective competition.

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[82] *See ACLU* at 1571.

[83] *See* 47 U.S.C. § 543(b)(2)(B).

[84] *See* 1984 House Report at 45; colloquy between Senator Lautenberg and Senator Goldwater (a principal Cable Act author and Senate floor manager), 129 Cong. Rec. S 8255 (June 13, 1983).

[85] *See, e.g.*, 47 U.S.C. § 555.

[86] In this regard, Southwest Missouri Cable TV, the only commenter to address the Initial Regulatory Flexibility Act analysis in the *Notice*, states that the imposition of additional recordkeeping requirements in the area of rate regulation would add tremendous administrative burdens and expenses to small cable operators.

[87] Similarly, commenters have not identified any benefits that would be derived from reinstituting an annual financial reporting requirement that would outweigh the costs it would impose on cable operators or the Commission. In addition, we will not require that cable operators file informational tariffs for noncable services with the Commission, pursuant to Section 621(d)(1) of the Cable Act, as we continue to believe that publicly available data are sufficient. We have not found a need for such tariffs, and commenters have not convinced us otherwise. We believe that to collect data solely for the sake of compiling information would place additional burdens on cable operators and the Commission without offsetting tangible benefits.

[88] This rule permits any party seeking to establish either the presence or absence of effective competition to petition the Commission in accordance with the provisions and procedures set forth in Section 76.7 on special relief. 47 CFR §§ 76.33, 76.7.

73. *Comments.* The great majority of commenters continue to favor local franchising authorities as the initial judges of whether effective competition exists. Those that oppose this result repeat the arguments considered previously that franchising authorities are not sufficiently impartial to make such determinations. Some parties suggest that a time limit for making such rulings should be imposed on franchising authorities.

74. In response to the *Further Notice*, commenters did not address the proposed standards to rebut a *prima facie* showing of the existence or absence of effective competition, althoughNTIA suggests a case-by-case approach for "determining whether the signal quality of an over-the-air broadcast station is adequate within a cable community as an alternative to the penetration criterion in the signal/penetration test. NTIA believes that the measures for determining whether a signal is available in the cable community, predicted Grade B contour and significantly viewed status, are already sensitive, to some extent, to potential deficiencies in broadcast signal quality. However, NTIA recommends that the Commission amend its rules to permit a community to demonstrate that, although the signal's predicted Grade B contour covers the cable community, it does not provide a picture of acceptable quality. Thus, a local community would have the opportunity, and the procedural burden, to establish that fact. [89]

75. In its petition for reconsideration of the *Second Report and Order* in MM Docket No. 84-1296, Dubuque requests a number of changes to the existing waiver procedures. Dubuque argues that the methodology specified for field strength measurements to determine actual signal availability in the cable community in waiver proceedings should take into account population densities, not merely geographic areas. Dubuque believes that the requirement that 50 percent of the testing locations must register below Grade B quality service in order to disprove signal availability should refer to the percentage of population, not geographic area, because population dispersion may vary considerably in some communities. Dubuque maintains that any assumption that a signal's geographic coverage roughly approximates its population coverage is unwarranted. In addition, Dubuque argues that because no procedure is presently available to challenge a significant viewing survey (or waiver petition), the Commission should revise its procedures to afford one. Petitioner states that, by its proposal, it is not seeking authority to submit competing significant viewing studies but merely requesting that the Commission establish procedures whereby a significant viewing survey can be superseded in light of changed circumstance.

76. Furthermore, in its petition, Dubuque requests that the Commission modify the cost reimbursement rule so that the full costs of prosecuting a waiver proceeding, legal as well as engineering costs, are included. [90] Dubuque states that this modification will distribute more equitably the entire burden of the waiver process consistent with the concern expressed in the *ACLU* decision and apply an enhanced incentive for the franchising authority and cable operator to reach a settlement without burdening the Commission's processes. [91]

77. *Analysis.* The great majority of commenters, including at least some representative of all interests involved in this proceeding, continue to support the proposal to delegate to the franchising authority the responsibility for the initial determination of whether effective competition, as defined in this proceeding, exists in its community. As we stated in the *Further Notice*, this is a logical approach to deciding when cable rate regulation should be permitted in any individual case. If a franchising authority chooses not to regulate basic service rates, there is no need to determine the existence of effective competition. Where the authority wishes to regulate rates and has obtained authority through its franchise agreement or otherwise to do so, it is appropriate for this body to first determine whether the subject cable system(s) meets the effective competition standard. The provision for Commission review of such determinations, which will be retained in the form of Section 76.33(c), should sufficiently mitigate any erroneous decisions. Moreover, reserving to the Commission the task of making numerous such judgments in the immediate aftermath of this decision would not only critically strain our resources, but also result in unacceptable delays in implementing the effects of this rule making.

78. Establishment of a time frame for the rendering of initial decisions by franchising authorities pursuant to this rule making appears to be unnecessary. Most cable systems are currently unregulated, and those that are regulated are not likely to be released from rate regulation by this *Report and Order*. Consequently, there is no detriment to them if a franchising authority takes an excessive amount of time to determine that they can and should be regulated. In cases where franchising authorities are permitted to regulate basic cable rates, and elect to do so, the timing of any necessary action is completely within their control. [92]

79. We will not adopt the suggestion of a few parties (primarily wireless cable entities) that franchising authorities not be permitted to impose rate regulation unless they have made affirmative efforts to achieve competition by alternative multichannel providers. There is considerable question whether such a provision would be within the purview of the Cable Act. The discretion to award "one or more" franchises is clearly placed in the hands of local authorities by Congress. [93] The Commission strongly believes, however, that local franchising authorities should be given every incentive to encourage

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[89] In light of our decision against the use of a penetration criterion to assess over-the-air signal quality, we find it unnecessary to further consider NTIA's recommendation.

[90] Section 76.33(c) of the rules allocates responsibility for the cost of engineering studies undertaken to refute the predicted availability of Grade B service to the party that loses the waiver proceeding. *See* 47 CFR § 76.33(c). *See also Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd at 2624-2625.

[91] In *ACLU*, the court advised the Commission to reexamine the waiver process particularly in view of "the substantial barrier the current waiver system may place on franchising authorities." *See ACLU* at 1573, n. 37.

[92] The promptness of decisions on changes from regulated to unregulated status do not bear on this analysis, and the matter is discussed below in conjunction with change of status issues.

[93] *See* Section 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1). In its Cable Report to Congress, the Commission recommended that Congress encourage increased competition by forbidding franchising authorities from unreasonably denying a franchise to potential competitors. *See Report* in MM Docket No. 89-600, 5

and welcome competition, and we recommended in the Cable Report that Congress amend the Cable Act to forbid local franchising authorities from unreasonably denying a franchise to applicants that are ready and able to provide service. We also recommended that Congress make it clear that local franchising authorities may not pass rules whose effect or intent is to create unreasonable barriers to the entry of potential competing multichannel video providers. [94] Indeed, we believe that a lack of clarity on this point inhibits the growth of competition but, for the moment, the provisions of the Cable Act constrain us from acting in this area.

80. We will retain Section 76.33(c) of the rules, which permits any party seeking to establish either the presence or absence of effective competition to petition the Commission in accordance with special relief provisions of Section 76.7. We believe that the lack of comment on this issue indicates that commenters concur with our assessment that existing procedures are appropriate. However, when disputes arise between a cable system and its franchising authority, the presumption in a proceeding before the Commission will be that effective competition does not exist. Thus, in such a proceeding, the cable system will have the burden to demonstrate that effective competition exists.

81. We will retain the existing rules relating to the submission of engineering studies showing actual signal availability by parties seeking to rebut the predicted Grade B standard of signal availability for full service stations. [95] With respect to translators, we clarify the rules relating to the submission of engineering studies by parties seeking a waiver of the standard of signal availability. Parties will now be required to submit engineering studies that show the actual protected contour of such signals, as defined in Section 74.707 of the rules, using the methodology specified in Section 73.686. These rebuttal standards will also apply for low power television stations. The party intending to obtain a study must first inform the other party and provide it an opportunity to negotiate a resolution.

82. With respect to the issues raised in this regard in Dubuque's petition for reconsideration, we are not persuaded that it is necessary to modify the requirements of field strength studies to account for population densities throughout the cable community. While the measurement locations exceeding the Grade B signal levels, pursuant to Section 73.686(c) of the rules, need not comprise a rigidly precise uniform distribution across the entire community, they must nevertheless be generally distributed throughout the entire community. Thus, only in rare circumstances would it be possible for a properly executed field strength study to indicate that a signal is receivable in the cable community for effective competition purposes, when, in fact, only a minority of the cable community's population can actually receive the signal. Moreover, when the Commission considers a waiver petition, an opposing party may submit specialized information relating to factors such as intervening terrain, large distances, unusual population distributions or any other factor likely to distort the engineering data. [96]

83. In its reconsideration petition, Dubuque also seeks procedures for challenging significantly viewed surveys, although it does not provide any suggested alternative. The Commission's rules already afford interested parties the opportunity to comment on any potential or actual problems associated with a significant viewing survey before it is undertaken. [97] After a completed survey is submitted to the Commission, the rules permit all interested parties to file objections to the submitted survey that the Commission can use when it evaluates the data to determine whether a signal should be declared significantly viewed. [98] As stated in the *Second Report and Order*, this process was established for receipt of objections relating to intervening terrain, large distances, unusual population distribution or any other factor likely to distort the resulting data. [99] We believe that these provisions give interested parties, such as Dubuque, ample opportunity to apprise the Commission of any problems associated with an individual significant viewing study and, thus, deny this aspect of Dubuque's petition for reconsideration.

84. Regarding the matter of cost reimbursement, as a general principle, we believe that each party in a contested proceeding should bear its own expenses. Indeed, as TCI argued in its now-withdrawn petition for reconsideration in MM Docket 84-1296, the Commission lacks authority to require one party to pay the litigation-related expenses of another. *See Turner v. FCC*, 514 F. 2d 1354 (D.C. Cir. 1975). Accordingly, on our own motion, we are eliminating our existing rule regarding reimbursement of the cost of engineering studies and are not adopting additional cost-shifting rules. Accordingly, we reject Dubuque's proposal to include attorney's fees in the cost reimbursement rule.

85. Franchising authorities or cable operators disputing the availability or penetration information provided by the alternative video delivery services considered for the multichannel competitor test may submit additional information for our review. We will consider any information concerning aspects of these services within specific local communities, such as technical or realistic availability of competing services as well as information about other competitors, as rebuttal evidence. In particular, with respect to MMDS, we will consider the coverage area to be the protected contour as provided in Section 21.902(d) and (e) of the rules. [100] We will also permit a cable operator to submit information on rebuttal to show that an MMDS system is actually available to a greater area.

FCC Rcd at 4974. *See also* House Committee on Energy and Commerce, H. R. Rep. No. 101-682, 101st Cong., 2nd Sess. (1990) (1990 House Report) at 42.

[94] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5036.

[95] *See* Section 73.686, 47 CFR § 73.686. *See also Second Report and Order* in MM Docket No. 84-1296, *supra*.

[96] The procedures set forth in Section 76.7(d) allow interested parties to submit comments or oppositions to a petition within thirty days after it is filed. *See* 47 CFR § 76.7(d).

[97] Section 76.54(c) of the rules provides that interested parties be given notice of a survey at least thirty days prior to the initial survey period. The notice must identify the proposed survey organization and describe the survey methodology. Objections to the survey organization or the proposed procedures may be served on the party sponsoring the survey within 20 days after receipt of the notice. *See* 47 CFR § 76.54(c).

[98] *See* 47 CFR § 76.7(d).

[99] *See Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd at 2620.

[100] 47 CFR § 21.902(d) and (e).

2. Procedures for Determining a Change in Status

86. The *Further Notice* requested comment on the implementation of rate regulation in situations where changes in market conditions cause a cable system no longer to face effective competition. Specifically, we proposed a six month transition period for situations where a system initially subject to effective competition no longer faces effective competition. [101] Conversely, where a cable system initially does not face effective competition and its basic cable service rates are regulated, we proposed that such rate regulation should cease immediately upon determination that changed circumstances cause the system to meet one of the conditions of the effective competition standard. We further proposed that in situations where the franchising authority and cable system disagree regarding the changed circumstances, the *status quo* be maintained until the matter is resolved.

87. *Comments.* Most commenters agree that a cable system should be deregulated immediately upon a determination that it has become subject to effective competition. There is a wider disparity of opinion regarding cable systems where effective competition ceases to exist, with NAB and franchising authorities generally favoring shorter transition periods than proposed (or none at all), and cable companies generally favoring longer transition periods. Commenters favoring a shorter period argue that transition periods have no significant regulatory purpose and that cable operators should not be permitted to impose monopoly rates for any period of time, once it is determined that a monopoly exists. Commenters favoring longer periods primarily strive to delay the effects of the introduction of rate regulation. [102] A few commenters contend that the same transition period should apply to both types of change in status, arguing that the termination of rate regulation puts as great a burden on consumers as the introduction of rate regulation puts on cable operators.

88. *Analysis.* Once a cable system is found to face effective competition, there is neither a need nor the legal authority upon which to continue regulation of its rates. Accordingly, a previously regulated cable system which becomes subject to effective competition will be relieved of rate regulation immediately upon such a final determination. While it may initially appear appropriate to apply the same rule to the converse situation, when effective competition no longer exists, additional factors require consideration in those cases. Significantly, a change from unregulated to regulated status has the potential to alter revenues for the affected operators. This can in turn require an adjustment in the operator's contracts and, consequently, its offerings. On the other side, however, as pointed out by commenters, once there is a determination that effective competition no longer exists, subscribers should not be subjected to unregulated rates. In considering this matter, we observe that commenters suggest numerous alternative transition periods, although none has provided any compelling reason for choosing a particular time period for transition under these circumstances. We now believe that a 60 day delay in the introduction of rate regulation represents a reasonable balancing of these directly conflicting, meritorious considerations. Sixty days should provide ample time to anticipate and effectuate any changes necessitated by the impending introduction of rate regulation. [103] At the same time, it will minimize any negative consequences for consumers of the continued unregulated operation in the absence of effective competition. Moreover, we find that a transition period of longer duration cannot be justified in light of our desire, consistent with the intent of the Cable Act, to ensure that basic cable service is available at competitive rates in the absence of effective competition.

89. During the pendency of an appeal of a determination regarding a change in status, the *status quo* prior to that determination will be maintained. The retention of *status quo* relates to the regulatory status of the cable system, not to the rates it may be charging at the time of the disputed determination. That is, previously regulated systems will remain regulated during their appeal of a denial of their request to be deregulated; previously unregulated systems will remain unregulated during their appeal of a franchising authority's determination that they are subject to rate regulation. As unregulated systems they will remain free to change their rates during this time. That *status quo* will be likewise maintained during either party's appeal of a Commission decision reviewing a franchising authority's action.

90. However, cable operators that raise their rates during this period do so at their peril, should the Commission subsequently affirm that the cable system does not face effective competition under the new standard. In such circumstances, the franchising authority can rebate the increase in the cable operator's basic service rate to subscribers. Furthermore, in such situations, the franchising authority may also require the cable operator to refund to subscribers interest, determined on the basis of the existing rate applicable to federal income tax refunds and payments, on the excess rates charged during the pendency of appeal to compensate for the excess revenues collected when the cable system should properly have been regulated. [104] We believe this procedure will discourage cable operators from using the appeal process as an opportunity to raise rates and will justly compensate

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[101] Section 76.33(a)(4) currently permits a one year transition period in such situations.

[102] A number of parties contend that longer transition periods are necessary prior to the imposition of rate regulation because a cable company's status may change because of conditions beyond its control. Presumably, a longer period would provide such an operator an opportunity to take steps to return to the mantle of effective competition before regulation is imposed. These arguments seem to have been premised on the inclusion of a competitive behavior standard in the effective competition test, so that changes in national averages or sudden unavailability of a critical service could change an operator's status. These arguments are obviously moot in the absence of such a standard.

[103] For those rare instances where a change in circumstances sufficient to effect a change in status is anticipated to be temporary (less than 18 months) *e.g.*, the temporary closing of a station, the affected cable system can petition for a temporary exemption from the rule.

[104] We note that these procedures are similar to those in Section 1.1410 of the rules for overcharges of pole attachment rates. 47 CFR § 1.1410. *See Memorandum Opinion and Order*, File No. PA 79-0029, 79 FCC 2d 232 (1980) at 237-239.

consumers for any excess charges over a period when their cable system was at least preliminarily ruled as not subject to effective competition.

3. Effective Date

91. Previously, the Commission has provided a transitional period before imposing a new or modified effective competition standard for determining rate regulation of basic cable services rates for existing cable systems. In the *Notice*, we requested comment on whether we should delay the implementation of any new rules that we may adopt, and, if so, for how long. In the *Further Notice*, we noted that neither the Cable Act nor our rules would require a transition period if the Commission modified its effective competition standard. Thus, we stated that we expect to make any revised rules effective ninety days after release of the *Report and Order* subject to approval by the Office of Management and Budget.

92. *Comments.* In response to the *Notice*, a few commenters, mostly franchising authorities, oppose any postponement of the implementation of any new rules. They assert that there is no evidence that cable operators will be unable to adjust quickly to changes in the rules, and that swift implementation will minimize the time within cable operators can redesign their basic tiers or increase rates to undermine the intent of new rules. Several cable operators, however, observe that Section 76.33(a)(4) of the existing rules allows a one year transition period for systems whose status changes from deregulated to regulated because of changed circumstances in the local television market and believe that a similar one year transition period would be appropriate. Parties addressing this issue in their comments to the *Further Notice* generally followed the same lines of both alliance and reasoning as in the previous discussion regarding transition periods for changes in status. [105]

93. *Analysis.* For the reasons discussed *supra*, we do not believe that an extensive transition period is needed before the effective competition standard becomes effective. Consumers should be relieved of any monopoly charges as promptly as is reasonably possible without unduly jeopardizing the operation of cable systems. Administrative and procedural requirements of the Paperwork Reduction Act prompt us to delay effectuation for ninety days. This should bring reasonably prompt relief to consumers affected by this proceeding and, when combined with the public and protracted nature of our deliberations, provide sufficient opportunity for cable systems to minimize any temporary dislocations triggered by the new rules.

4. Authority to Counteract Strategic Behavior

94. In the *Notice*, we noted that any new rules we may adopt would likely authorize more franchising authorities to regulate the basic service rates of their local cable television systems. We asked commenters to consider whether there was any action we could or should take that would prevent cable systems from engaging in strategic behavior (*e.g.*, raising rates or retiering) that could contravene the intent of any new rules during the time between adoption of new rules and their implementation.

95. *Comments.* With regard to rate increases in anticipation of rate regulation, NTIA and cable commenters argue that the Commission has no authority to roll-back rate increases. Cable interests point out that in accordance with the Cable Act rates may only be regulated where effective competition does not exist. Therefore, they argue, if the effective competition standard changes, the Commission does not have authority to require the roll-back of rates that were increased during a period when the effective competition standard was met. [106] In addition, the Cable Operators asserts that retroactive measures would be inconsistent with the Administrative Procedure Act requirement that rule making power be exercised prospectively. [107] Cable Operators also argues that such action would violate the Fifth Amendment because it would be a taking of lawfully earned money without just compensation.

96. Commenters, including NTIA, cable interests, NAB and WCA, indicate that the Commission and franchising authorities also lack authority to prevent retiering. Commenters contend that Section 625(d) of the Cable Act (47 U.S.C. § 545(d)) expressly prohibits the Commission or any franchising authority from interfering with cable operators' abilities to retier program services among unregulated tiers. [108] Parties also state that such action would violate the First Amendment because it would interfere with the cable operator's editorial discretion to determine freely what service would be carried and how such services should be marketed.

97. Dubuque and Flat Rock Cable Communications Commission support requirements that would prevent cable operator strategic behavior. In particular, Dubuque claims that the Commission should stabilize basic cable rates and service at December 1, 1989, levels. [109] Dubuque argues that under administrative law an agency not only has those powers expressly granted to it, but also implied powers to meet its statutory responsibilities. Thus, Dubuque believes that the Commission has the power to deal with actions that would interfere with the implementation of new rules for regulation of basic cable rates. To prevent circumvention of the rules through retiering, Dubuque recommends that basic cable service be redefined for the purpose of rate regulation as any tier that includes local broadcast signals, PEG (*i.e.*, public, educational or government) channels or advertiser-supported program services. Dubuque states that the *ACLU* decision did not prohibit a revised basic service definition, but rather only invalidated

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[105] And again, one of the primary bases for seeking an extended period prior to effectuation of the rules was to provide opportunity to conform to the anticipated competitive behavior standard, which has not been adopted.

[106] Parties also argue that Congress clearly intended the establishment of an effective competition standard for rate regulation to be prospective as indicated by the prospective effective date in the statute.

[107] 5 U.S.C. §551(4). *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

[108] A number of commenters, such as Continental Cablevision, observe that the right of cable operators to rearrange tiers predates the Cable Act. *See Community Cable TV, Inc.*, 56 RR 2d 735 (1984).

[109] December 1, 1989, was selected by the commenter because Chairman Sikes announced to Congress on November 17, 1989, that the Commission would review the rate regulation rules.

one that limited rate regulation to one tier when Congress clearly contemplated that basic service could be more than one tier.

98. *Analysis.* While the Commission's authority to take those actions necessary to meet its statutory authority extends beyond specific powers expressly granted, [110] such authority does not exist in the face of explicit statutory limitations. We concur with NTIA and cable commenters that the Commission lacks authority to roll back basic service rates that were increased by a cable system that faced effective competition under the rules that existed at the time of the increase. The Cable Act clearly specifies that rates may only be regulated when the cable system does not face effective competition as defined by the Commission. With respect to retiering, Section 625 of the Cable Act explicitly and narrowly proscribes this Commission's and franchising authorities' ability to interfere in decisions by cable companies regarding unregulated tiers of service, which would include all tiers prior to institution of regulation. There is nothing in the legislative history of the Cable Act to indicate that Congress intended any other reading of what appears to be plain language in the Cable Act. Thus, while we recognize that retiering in anticipation of regulation may affect the number of services offered on the basic tier, we find that the Cable Act clearly prevents any action by the Commission in this regard.[111] Accordingly, no provisions regarding retiering prior to the imposition of rate regulation will be adopted. [112]

D. Must Carry

99. In the *Further Notice*, we solicited comment on the relationship, if any, between the rules governing effective competition and the absence of signal carriage regulations. We noted that the Cable Act was adopted at a time when signal carriage obligations were in place. Accordingly, we asked parties to comment on whether signal carriage obligations should be included as part of our effective competition standard and, if so, how. While a number of parties addressed this matter, and we summarize their comments below, we find that the record to date is too limited to definitively establish whether a link exists between effective competition and mandatory signal carriage. Thus, in conjunction with the *Report and Order* we adopt today to modify the rules for the regulation of basic cable rates, we adopt a *Second Further Notice* to seek additional information on whether must carry rules are needed and how they should be tailored to survive a constitutional challenge.

100. *Comments.* NAB, INTV, the Association of America's Public Television Stations (AAPTS), the Motion Picture Association of America (MPAA), various broadcast stations (including low power television stations) and individual cities strongly favor reimposition of must carry rules. These commenters argue that must carry rules were an essential part of the regulatory balance underlying the Cable Act by preventing deregulated cable systems from exploiting their bottleneck status by denying carriage to competing broadcast stations. Must carry rules also provided a uniform approach to regulating the basic tier by creating a minimum level of "basic service." The commenters also note that if broadcast signals are to provide any competition to cable, they must be carried on cable systems. Otherwise, in areas of high cable penetration, broadcasters will lose much of their audience. This will lead to a decline in advertising revenues and consequent harm to the viability of broadcast stations. Finally, the commenters urge that must carry rules can be constitutionally justified by the government's substantial interest in preserving the system of local broadcasting, promoting competition, and ensuring diversity. The commenters argue that there is an ample record that the absence of must carry rules is harming these goals, and must carry regulations are a narrowly tailored means to achieving these goals.

101. The commenters favoring the reimposition of must carry rules differ on the issue of whether the rules should be imposed *as part of*, or *in addition to*, an effective competition standard. NAB and INTV believe that the rules should not be part of any effective competition standard for two reasons. First, if the rules were part of the effective competition standard, a cable operator who could not otherwise meet the effective competition test would have no incentive to carry local broadcast signals. Second, the Cable Act reflects a congressional assumption that must carry would apply to *all* cable systems, whether or not their rates were regulated.

102. AAPTS, MPAA and many low power television stations argue that signal carriage rules can be incorporated into the effective competition standard. For example, only those signals that cable systems actually carried would count toward meeting the six signal requirement. If the Commission were to adopt a behavioral test, it should require carriage of local signals to meet the competitive behavior standard.

103. Commenters opposing the reimposition of the must carry rules include CATA and other cable companies and associations. They point out that the Court of Appeals had twice held must carry rules to be unconstitutional, and the rules would again be struck down if the Commission were to attempt to reimpose them.

104. *Analysis.* When Congress adopted the Cable Communications Policy Act of 1984, must carry rules were in effect. Today they are not. Many broadcasters believe that their ability to provide "effective competition" to cable depends upon the reinstitution of some form of must carry rules. Based on this belief, they further assert that the effectiveness of the Commission's new six signal standard depends on whether the six signals deemed to be "effective competition" to basic cable service are, in fact, carried on the system.

105. Must carry rules were first adopted over two decades ago, at a time when cable television was viewed as an antenna service strictly "ancillary" to broadcasting, intended primarily to extend and supplement the reception

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[110] *See, e.g.*, 47 U.S.C. 154(i).

[111] We believe that the Cable Act provides that a cable operator may move services from one tier to another unless the franchising agreement requires that such service be carried on a basic tier that is rate regulated.

[112] The relatively short transition periods preceding these rule changes becoming effective and changes in status thereafter becoming effective should mitigate the potential for retiering on a widespread basis.

of offair television. [113] Since that time both the number of cable systems and cablecast program services have expanded exponentially; cable has become the way most Americans receive television, [114] and the Cable Act was enacted to establish a national regulatory policy for cable television that recognizes its importance and furthers its ability to deliver "the widest possible diversity of information sources and services to the public." [115]

106. Against this backdrop of explosive cable development, the Commission's must carry rules have twice been invalidated by the courts.[116] Although the courts found that must carry rules as previously formulated violated the First Amendment, congressional concern over the must carry issue has persisted. For example the Senate Committee Report on the Cable Act emphasized that the "Committee recognizes the importance of local programming" and "under the current regulatory framework and existing copyright law, the Committee sees a need to continue the existing 'must carry' rules."[117] ("Regulations which. .. remain in effect include the FCC's must carry requirements.") The Committee Report on S. 1880 last year found that the "vital local service" broadcasters provide, specifically including "news and public affairs offerings and emergency broadcasts," would be "in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of these signals." [118] Similarly, the Committee Report on H. R. 5267 pointed out that "without a requirement that local broadcast signals be carried on cable systems, the substantial public benefits that television has created over more than 40 years may be lost, jeopardizing the competitive balance that the Communications Act. .. sought to achieve." [119]

107. Fueling this concern is evidence that in numerous instances since the invalidation of the must carry rules cable operators have denied some local broadcasters carriage on their systems. The most recent Commission analysis of this issue was undertaken in 1988 by the Policy and Rules Division of the Mass Media Bureau in response to congressional requests. The resulting report disclosed that, of the approximately 4300 cable systems that voluntarily disclosed data to the Commission, about 20 percent had declined to carry one or more television stations. This amounted to 1,820 reported instances of noncarriage. [120]

108. The Commission has long been concerned with the competitive imbalance between cable and broadcasting that resulted in part from the elimination of must carry rules. For this reason, the Commission recommended in 1989 that Congress eliminate the cable compulsory license[121] and recommended in 1990 that Congress either reinstate must carry rules or eliminate the compulsory license and give broadcasters a clearly defined right to bargain for compensation for retransmission of their programming. [122] To the extent that noncarriage of local broadcast signals critically and substantially affects the ability of local stations to present news, public affairs and other programming that serves local needs and interests, the system of widely-available over-theair broadcasting that Congress encouraged in enacting Title III of the Communications Act could be undermined. This prospect is enhanced to the extent that a person subscribing to cable television loses the ability to access local stations not carried on cable. [123]

109. If these assertions are correct, and if broadcast stations are being seriously harmed as a result, the efficacy of the Commission's six signal standard may turn on whether the six broadcast stations are in fact carried on the cable system. We ask for further comment on this issue. In particular, we request comment on whether it would be sound public policy for the Commission to further amend its effective competition rules to provide that a cable system will be considered subject to effective competition only where the six stations in question are carried by the cable system. In this regard we ask commenters to provide specific information on the extent to which the lack of must carry rules has undermined effective competition. We further ask whether there are legal justifications, such as Section 307(b) of the Communications Act, which seeks to provide for an equitable distribution of communications facilities across the country, that may support reimposition of must carry rules, either in connection with the effective competition standard or separately.

110. Although both this Commission and Congress have addressed the issues surrounding the establishment of must carry rules, we believe that we expect that any new must carry regime, whether enacted by the Commission or by the Congress, would face an inevitable judicial challenge. As previously noted courts have twice struck down previous versions of must carry rules, although

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[113] *First Report and Order* in Docket No. 14895, 38 FCC 683 (1965); *Second Report and Order* in Docket No. 14895, 2 FCC 2d 725 (1966); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[114] 1990 House Report at 61. Nielsen figures for May 1991 indicate that 60.3 percent of television households subscribe to basic cable service. Florence Setzer and Jonathan Levy,*Broadcast Television in a Multichannel Marketplace,* FCC, Office of Plans and Policy, June 1991, at 70.

[115] 47 U.S.C. § 521(4); 1984 House Report at 20-23.

[116] *Quincy Cable TV v. FCC (Quincy)*, 768 F. 2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); *Century Communications Corp. v. FCC (Century Communications)* , 835 F. 2d 292 (D.C. Cir. 1987),*cert. denied*, 486 U.S. 1032 (1988).

[117] S. Rep. No. 67, 98th Cong. 1st Sess. at 11-17 (1983). *See also* 1984 House Report at 40, 70.

[118] S. Rep. No. 101-381, 101st Cong. 2d Sess. (1990 Senate Report) at 32.

[119] 1990 House Report at 56.

[120] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, September 1, 1988. The Staff Report did not determine whether all the stations involved would actually have been entitled to carriage under the pre-1985 must carry rules in the first instance. *Id.* at 5, n. 5; 6. However, it should be noted that in 753 reported instances of noncarriage, stations would have been eligible for must carry status under the limited "compromise" post-*Quincy* must carry rules. *See* 1990 Senate Report at 33; 1990 House Report at 56-60. The Senate Committee considered these findings "extremely conservative." 1990 Senate Report at 34.

[121] *Compulsory Copyright License for Cable Retransmission (Report to Congress)*, 4 FCC Rcd 6562.

[122] *Report* in MM Docket 89-600, 5 FCC Rcd at 5043-44; *Compulsory Copyright License for Cable Retransmission* (Report to Congress), 4 FCC Rcd 6562, 6585-86 (1989).

[123] It has been found that fewer than one percent of cable subscribers have an outdoor antenna and an A/B switch. 1990 Senate Report, *supra* at n. 5, 36. In addition, indoor antennae may provide technically inferior reception, particularly for UHF stations.

neither court held must carry rules to be *per se* unconstitutional. [124] In *Quincy*, the court found that the Commission had failed to substantiate its assumption that must carry rules were needed to preserve the viability of local broadcast stations and that certain of the Commission's other deregulatory measures were inconsistent with this assumption. [125] The court in *Century Communications* found that the Commission had failed to support its conclusion that interim must carry rules were necessary to enable consumers to become accustomed to A/B switches. [126] In both cases, the court said that the Commission "failed to put itself in a position to know 'whether the problem its regulations seek to solve' is a real or fanciful threat." [127]

111. By this *Second Further Notice*, we intend to put the Commission "in a position to know" whether, in today's video marketplace, must carry rules are needed and, if so, whether they can be constitutionally tailored to address the concerns articulated by the court in *Quincy* and *Century Communications*. [128] Specifically, we invite commenters to provide additional information regarding the effect (or lack thereof) of noncarriage on local broadcasters and to relate this information to the continued ability of these stations to broadcast programming serving the needs and interests of local viewers. In this context commenters should analyze whether must carry rules would assist substantially in preserving the system of over-the-air broadcasting established in the Communications Act. We expect commenters to supply persuasive evidence of real harm to the ability of the broadcast system to serve the public interest, as well as closely reasoned legal analysis supporting the specific actions the Commission could take. To the extent commenters favor must carry rules as a means of addressing other policies, they should similarly illustrate the nexus between the purported problem and solution, and provide a reasoned legal06argument showing that their proposal will constitute an incidental restriction on speech that "furthers an important or substantial government interest, and is no greater than is essential to the furtherance of that interest." [129]

IV. CONCLUSION

112. Pursuant to the authority granted us by Congress in the Cable Act, in this *Report and Order and Second Further Notice of Proposed Rule Making*, we revise our standard for determining whether a cable system is subject to effective competition and, thus, exempt from regulation of its basic service rates by its local franchising authority. Under our revised rules, a cable system will be presumed to face effective competition if either of the following conditions are met: 1) six unduplicated over-the-air broadcast television signals are available in the entire cable community; or, 2) an independently owned, competing multichannel video delivery service is available to 50 percent of the homes passed by the incumbent cable system and is subscribed to by at least 10 percent of the homes passed by the alternative system within the incumbent cable system's service area. We believe that this new standard strikes the optimal balance between our concern that cable systems may be able to exert undue market power and our desire to minimize regulation. For those cable systems not meeting the effective competition test, and subject to rate regulation by their local franchising authority, we adopt new procedural and rate-setting rules. Franchising authorities will now be required to issue a written decision in all rate-making proceedings. In determining the regulated rate, franchising authorities will be required to allow cable operators to earn a fair return on investment taking into account certain costs related to the provision of basic cable service as well as the cost of any requirements made by the franchising authority that do not relate directly to the provision of cable service. Finally, we request additional comments on whether we should adopt must carry requirements in conjunction with our effective competition rules.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

113. The Commission's final regulatory flexibility analysis for this *Report and Order* is set forth in Appendix C.

114. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix D. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Second Further Notice of Proposed Rule Making*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Ad-

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[124] *Century Communications*, *supra* at 304; *Quincy*, *supra* at 1463.

[125] For example, the court found elimination of syndicated exclusivity rules, which also were premised on preservation of local broadcasting, to be inconsistent with continuation of must carry rules. *Quincy*, 768 F. 2d at 145556. Syndicated exclusivity rules have since been reimposed. Moreover, the court found that the economic assumptions underlying must carry rules were undermined by the Commission's 1979 Economic Inquiry Report, which found that cable TV posed no "significant threat" to local broadcasting. *Id.* at 1457-58. This *Second Further Notice* will assist the Commission in assessing changes in the competitive dynamics between broadcasting and cable since 1979.

[126] The Court therein stated that "Our decision today is a narrow one. We hold simply that, in the absence of record evidence to support its policy, the FCC's reimposition of must carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored. .." 835 F. 2d at 304. Among other findings the court noted that "[e]xperience belies th[e] assertion" that "in the absence of must carry rules, cable companies would drop local broadcasts." *Id.* at 303. The court's findings predated the Commission staff's *Cable System Broadcast Signal Carriage Report*.

[127] *Id.* at 304-5, quoting *Quincy*, *supra* at 1457-59 (citation omitted).

[128] As the court in *Quincy* noted," [s]hould the Commission move beyond its more or less intuitive model . . . we would be extremely hesitant to second guess its expert judgment." 768 F. 2d at 1459.

[129] *Quincy* at 1445.

ministration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

115. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

116. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before September 25, 1991, and reply comments on or before October 25, 1991. To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

117. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 4(i),303 and 543(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i),303 and 543(b)(3), Part 76 of the Commission's Rules, 47 C.F.R., Part 76, IS AMENDED as set forth in Appendix B.

118. IT IS ORDERED that the rules set forth in Appendix B of this *Report and Order and Second Further Notice of Proposed Rule Making* will be effective October 25, 1991, pending approval by the Office of Management and Budget.

119. IT IS FURTHER ORDERED that the petition for reconsideration filed by the City of Dubuque, Iowa, is denied and the proceeding in MM Docket No. 841296 IS TERMINATED.

120. For further information on this proceeding, contact Marcia Glauberman, Policy and Rule Division, Mass Media Bureau, (202) 632-3410.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
LIST OF COMMENTERS

Notice of Proposed Rule Making Initial Comments

1. CMI Research, Inc.
2. Pacific West Cable Television

3. InterMedia Partners and InterMedia Partners II, L. P.

4. VideoProbeIndex, Inc.

5. ESPN, Inc.

6. Flat Rock Cable Communications Commission

7. Contra Costa County

8. Competitive Cable Association

9. Time Warner Inc.

10. National Association of Broadcasters

11. Consumer Federation of America and Telecommunications Research and Action Center

12. Association of Independent Television Stations, Inc.

13. Alliance of Small Cable System Operators

14. Continental Cablevision, Inc.

15. Tele-Communications, Inc.

16. Adelphia Communications Corporation, Arizona Cable Television Association, Coaxial Communications, Falcon Cable TV, Hauser Communications, Inc., National Cable Communications, Inc., Pennsylvania Cable Television Association, Prestige Cable TV, Inc., Star Cable Company, Tele-Media Corporation, Whitcom Investment Company

17. Southwest Missouri Cable TV, Inc.

18. National Satellite Programming Network, Inc., Beach Communications, Inc., Mid-Atlantic Communications, Inc., Stellar Communications, Inc., Telecom Satellite Systems Corp., Telesat Cablevision, Inc., and 21st Century Technology Group, Inc.

19. Community Antenna Television Association, Inc.

20. Turner Broadcasting System, Inc.

21. USA Network

22. Mid-America Cable Television Association, Inc.

23. National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., Maxtel Cablevision, Millisat Incorporated, NuMarket Cable Systems, Inc., Pacific Cablevision, Western Cable Communications, Inc.

24. Heritage Communications, Inc.

25. North Coast Cable

26. Arkansas Public Service Commission

27. New York State Consumer Protection Board

28. Public Service Commission of the District of Columbia

29. City of Dubuque, Iowa, Montgomery County, Maryland, and the City of St. Louis, Missouri

30. City of New York, The National League of Cities, and the United States Conference of Mayors

31. City of Ithaca, New York

32. State of Hawaii

33. Village of New Paltz, New York

34. Northwest Municipal Cable Council

35. Cablevision Systems Corporation

36. Newhouse Broadcasting Corporation

37. National Telecommunications and Information Administration

38. United States Catholic Conference

39. City of El Paso, Texas

40. City of Tucson, Arizona

41. Richard S. Leghorn

42. Massachusetts Community Antenna Television Commission

43. B. F. Investments, Inc.

44. Cablevision Industries Corporation, Comcast Corporation, Cox Cable Communications, Providence Journal Company, Sammons Communications, Inc., Summit Communications Group, Inc.

45. Multi-Micro, Inc.

46. National Rural Telecommunication Cooperative

47. Armstrong Utilities, Inc.

48. National Cable Television Association, Inc.

49. USA Cablesystems Inc.

50. Cable Television Operators and Associations

51. Motion Picture Association of America, Inc.

52. Channel America LPTV Holdings, Inc.

53. BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company

54. Wireless Cable Association, Inc.

55. Carol L. Bennefield

56. WXON-TV Inc.

57. Navy Broadcasting Service

58. City of Beverly Hills, California

Notice of Proposed Rule Making Reply Comments

1. City of Boston

2. Richard S. Leghorn

3. Tele-Communications, Inc.

4. National Telecommunications and Information Administration

5. Cable Television Operators and Associations

6. Association of Independent Television Stations, Inc.

7. National Association of Broadcasters

8. Scientific-Atlanta

9. United States Department of Justice

10. Mission Cable Company, L. P.

11. Montgomery County, Maryland

12. United States Telephone Association

13. City of New York, the National League of Cities and the United States Conference of Mayors

14. Mid-America Cable Television Association, Inc.

15. United Cable Television of Mid-Michigan, Inc.

16. USA Cablesystems Inc.

17. National Cable Television Association, Inc.

18. Ramsey/Washington Counties Suburban Cable Commission

19. National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., Maxtel Cablevision, Millisat Incorporated, NuMarket Cable Systems, Inc., Pacific Cablevision and Western Cable Communications, Inc.

20. Consumer Federation of America and Telecommunications Research Action Center

21. GTE Telephone Companies

22. BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company

23. Cablevision Systems Corporation

24. Family Entertainment, Inc.

25. Time Warner Inc.

26. Cox Enterprises, Inc.

27. General Instrument Corporation

28. USA Network and the Nashville Network

29. National Telephone Cooperative Association

30. The Weather Channel and Black Entertainment Television

31. Susquehanna Cable Co.

32. Westfield News Advertiser, Inc.

33. New York State Commission on Cable Television

34. C-TEC Cable Systems

35. Arts & Entertainment Cable Network

36. National Telephone Cooperative Association

Further Notice of Proposed Rule Making Initial Comment

1. National Telecommunications and Information Administration

2. United States Department of Justice

3. Consumer Federation of America And Telecommunications Research Action Center

4. Star Cable Associates

5. People of The State of California and The Public Utilities Commission of The State of California

6. New York State Consumer Protection Board

7. Cable Television Association of New York, Inc.

8. County of Marin, California

9. United States Telephone Association

10. H. S. Finer

11. Richard S. Leghorn

12. Community Broadcasters Association

13. USA Cablesystems Inc.

14. Cox Cable Communications

15. Eighty-Five Television Stations

16. Satellite Broadcasting and Communications Association of America

17. Telesat Cablevision, Inc.

18. Paging Associates, Inc.

19. Tele-Communications, Inc.

20. Triax Communications Corporation

21. Southwest Missouri Cable TV, Inc., Massillon Cable TV, Inc., Clear Picture, Inc., Midwest Video Electronics, Inc., Avenue TV Cable, Inc., and Fairmont Cable TV

22. QVC Network, Inc.

23. Puerto Rico Cable Television Association

24. Adelphia Communications Corporation, Arizona Cable Television Association, Coast T. V. Cable, Inc., Coaxial Communications, Donrey, Inc. d/b/a Donrey Media Group, Hauser Communications, Inc., Insight Communications Company, L. P., Mid-America Cable Television Association, Mount Vernon Cablevision, Inc., Pennsylvania Cable Television Association and Whitcom Investment Company

25. National Association of Broadcasters

26. Cooke Cablevision, Inc.

27. Bresnan Communications Company, Douglas Communications Corporation II, and Mission Cable Company, L. P.

28. Hughes Communications Galaxy, Inc.

29. Multnomah Cable Regulatory Commission and City of Wadsworth, Ohio

30. The City of New York, National League of Cities, United States Conference of Mayors, National Association of Counties, National Association of Telecommunications Officers and Advisors, City of Portland, Oregon, and Metropolitan Area Communications Commission

31. General Instrument Corporation

32. National Broadcasting Company

33. Channel America LPTV Holding, Inc.

34. Comcast Corporation

35. Susquehanna Cable Co.

36. The Weather Channel

37. California Cable Television Association

38. Chief Counsel for Advocacy of the United States Small Business Administration

39. Scientific-Atlanta

40. United States Satellite Broadcasting Company, Inc.

41. Association of Independent Television Stations, Inc.

42. Tekstar Cablevision

43. Prime Cable

44. Cities of Dubuque, Iowa; Laredo, Texas; and St. Louis, Missouri; The Office of the City Attorney of the City of Los Angeles, California; and Montgomery County, Maryland
45. Time Warner Inc.
46. William Lowell Putnam
47. National Cable Television Cooperative
48. KSBI
49. OCB Cablevision
50. Cable Communications of Willsboro
51. Fairfax County, Virginia
52. GTE
53. Missouri Public Service Commission
54. State of Hawaii
55. Beverly Hills, California
56. Sherwin Grossman
57. Myron T. Pattison
58. Beach TV
59. Northwest Municipal Cable Council
60. USA Network
61. City of Walnut, California
62. City of Boston, Massachusetts
63. National Federation of Local Cable Programmers
64. E! Entertainment Television, Inc.
65. Telecommunications Industry Association
66. Advanced Communications Corporation
67. City of Lewisville, Texas
68. Multi-Cablevision Co. of Livingston/Washtenaw
69. Continental Cablevision, Inc.
70. Alliance of Small Cable System Operators
71. Gerard M. Mackarevich
72. Guahan Airwaves, Inc.
73. Arts & Entertainment Network
74. Maclean Hunter Cable TV
75. National Cable Television Association, Inc.
76. Association of America's Public Television Stations
77. Cablevision Industries Corporation, Multimedia Cablevision, Inc., New England Cablevision, Inc., Providence Journal Company and Sammons Communications, Inc.
78. Massillon Cable TV, Inc.
79. Newhouse Broadcasting Corporation
80. Blade Communications, Inc.
81. Motion Picture Association of America, Inc.
82. Organization for the Protection and Advancement of Small Telephone Companies
83. ESPN, Inc.
84. Weststar Communications, Inc.
85. National Telephone Cooperative Association
86. David J. Garrity
87. Competitive Cable Association
88. Turner Broadcasting System, Inc.
89. Wireless Cable Association, Inc.
90. Connecticut Cable Television Association, Inc.
91. Massachusetts Community Antenna Television Commission
92. New York State Commission on Cable Television
93. Community Antenna Television Association, Inc.
94. Cable Operators and Associations
95. Verto Corporation and Universal Television Cable Systems, Inc.
96. Wometco Cable Corp.
97. Public Service Commission of The District of Columbia
98. Contel Corporation
99. City of San Diego, California
100. The Connecticut Parties
101. Channel 8, South Jersey TV
102. City of Jefferson, Missouri
103. State of New Jersey, Board of Public Utilities
104. Intercommunity Cable Regulatory Commission
105. WBH-TV
106. C-TEC Cable Systems
107. Village of Schaumburg, Illinois
108. Cencom Cable Associates, Inc.
109. City of Danville, Virginia
110. Douglas N. Ross
111. West Virginia Cable Television Advisory Board

Further Notice of Proposed Rule Making Reply Comments

1. Missouri Chapter of the National Association of Telecommunications Officers and Advisors
2. Cablevision Industries Corporation
3. Consumer Federation of America And Telecommunications Research Action Center
4. United States Catholic Conference
5. United States Telephone Association
6. Telesat Cablevision, Inc.
7. Adelphia Communications Corporation, Arizona Cable Television Association, Coaxial Communications, Donrey, Inc. d/b/a Donrey Media Group, Hauser Communications, Inc., Insight Communications Company, L. P., Mid-America Cable Television Association, Mount Vernon Cablevision, Inc., Pennsylvania Cable Television Association and Whitcom Investment Company
8. Tele-Communications, Inc.

9. Northland Communications Corporation, TCA Cable TV Inc., Guam Cable TV and Saipan Cable TV System

10. City of Marshall, Texas

11. Southwest Missouri Cable TV, Inc., Massillon Cable TV, Inc., Clear Picture, Inc., Avenue TV Cable, Inc., and Gateway Cablevision, Corp.

12. National Association of Broadcasters

13. Hughes Communications Galaxy, Inc.

14. Multnomah Cable Regulatory Commission and City of Wadsworth, Ohio

15. The City of New York, National League of Cities, United States Conference of Mayors, National Association of Counties, National Association of Telecommunications Officers and Advisors, City of Portland, Oregon, and Metropolitan Area Communications Commission

16. The Weather Channel

17. Association of Independent Television Stations, Inc.

18. Cities of Dubuque, Iowa; Guttenberg, Iowa; Laredo, Texas; St. Louis, Missouri; The Office of the City Attorney of the City of Los Angeles, California; and Montgomery County, Maryland

19. Time Warner Inc.

20. Fairfax County, Virginia

21. Continental Cablevision, Inc.

22. National Cable Television Association, Inc.

23. Association of America's Public Television Stations

24. National Telephone Cooperative Association

25. Competitive Cable Association

26. Turner Broadcasting System, Inc.

27. Connecticut Cable Television Association, Inc.

28. Cable Operators and Associations

29. Missouri Telephone Company

30. New Jersey Cable Television Association

31. National Rural Telecommunications Cooperative

32. City of Beverly Hills, California, and Communications Support Group, Santa Ana, California

33. New York State Commission on Cable Television

34. Intercommunity Cable Regulatory Commission

35. City of Portland Oregon

36. Mayor E. J. Collins, Gillette, Wyoming

Late-filed Comments

1. Federal Trade Commission, Staff of the Bureau of Economics and the San Francisco Regional Office

2. Supplement to Comments by 112 Television (previously Eighty-Five Television Stations)

3. National Association of Regulatory Utility Commissioners

APPENDIX B

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. Section 76.33 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.33 Standards for rate regulation.

(a) A franchising authority is delegated the authority in the first instance to determine whether effective competition, as defined in this paragraph, exists in its community. When disputes arise regarding the franchising authority's initial determination, the presumption in a proceeding before the Commission will be that effective competition does not exist. A franchising authority may regulate the rates of a cable system subject to the following conditions (cable systems that were subject to rate regulation prior to this date will remain subject to that regulation pending demonstration that they may not be regulated pursuant to this section):

(1) Only basic cable service as defined in § 76.5(ii) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever any one of the following conditions are met:

(i) 100 percent of the cable community receives service from at least six unduplicated broadcast television signals. It is not necessary that the same six signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in § 73.683 of the rules) or if they are significantly viewed within the cable community, as defined in Section 76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station is to be counted in the same manner as a full service station, except that its coverage area shall be based on its predicted protected contour as specified in Section 74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community. A low power television station is to be counted in the same manner as a full service station, except that its coverage area shall be based on its predicted protected contour as specified in Section 74.707 of the rules, provided it does not duplicate, as defined in the note below, another station counted in the same community.

Note: For purposes of this section," unduplicated broadcast television signal" is defined as one which does not simultaneously duplicate more than 50 percent of another signal's weekly prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n).

(ii) an independently owned, multichannel video delivery service is available to at least 50 percent of the homes passed by the incumbent cable system (*i.e.*, the number of homes to which cable service is currently available whether or not a given household subscribes to cable service),

and at least 10 percent of all homes passed by the alternative system within the incumbent cable system's service area actually subscribe to the service. Video delivery services that may be counted include a competing cable system, a multichannel, multipoint distribution system (MMDS), satellite master antenna television (SMATV), home satellite dishes (HSD), and direct broadcast satellite services (DBS). It is not necessary that the same multichannel video delivery service be available throughout the area. Availability of a competing multichannel video delivery system will be determined by dividing the number of homes passed by an alternative delivery service by the number of homes passed by the incumbent cable system and expressed as a percentage. The penetration of alternative video delivery services will be calculated by combining the number of subscribers to all available services and expressing that number as a percentage of the homes passed by both an alternative provider and the incumbent cable system. Availability and penetration information for the competing multichannel video delivery services may be obtained from publicly available sources, from the operator directly, or from specifically undertaken audits. DBS will be considered to be available to the entire United States when any one such service becomes operational.

Note: For purposes of this section, an MMDS service is considered to be "independently owned" if it meets the criteria contained in Section 21.912 of the rules. The following services will be considered to be "independently owned" if cable system ownership (including all parties under common control) does not exceed the criteria contained in Section 76.501 of the rules: SMATV, HSD, and DBS.

(3) The Commission may grant waivers of the effective competition standard where the filing party submits one or more of the following showings, as appropriate:

(i) the availability of full service broadcast signal(s) with engineering studies in accordance with § 73.686 of the Commission's rules or by other showings that such Grade B level signals are (or are not) in fact available within the community. In performing the engineering studies noted above, cluster measurements, as provided in § 73.686(b)(2)(viii), may be taken in place of mobile runs as provided in § 73.686(b)(2)(v). The availability of translator(s) or low power television station(s) with engineering studies in accordance with § 73.686 or other showings that show the protected contour of such signals, as defined in § 74.707. In conducting these engineering studies, cluster measurements as provided in § 73.686(b)(2)(viii) may be taken in place of the mobile runs as provided in § 73.686(b)(2)(v). Any party intending to obtain a study must first inform the other party and provide it an opportunity to negotiate a resolution.

(ii) the penetration of a competing cable system based on a survey of cable households passed and cable subscribers or more recent data;

(iii) the availability or penetration of alternative video delivery technologies specified in Section 76.33(a)(2)(ii) with additional information, or relevant information with respect to alternative video delivery technologies not included in Section 76.33(a)(2)(ii). The availability of MMDS may be demonstrated by a showing of its protected contour as specified in Section 21.902(d) and (e) of the rules.

(4) When a cable system not subject to effective competition becomes subject to effective competition due to any change in market conditions, the right of the local franchising authority to regulate the basic cable service rates of such cable system shall terminate immediately. A cable system, once determined to be subject to effective competition after the effective date of this section, shall not be subject to regulation for sixty days after any change in market conditions which would cause it to be determined not to be subject to effective competition. In instances where disputes arise between a cable system and a franchising authority regarding the changed circumstances, the status quo shall be maintained with respect to its regulatory status until the matter is resolved either by the parties or the Commission. However, if it is subsequently determined that the cable system does not face effective competition, the franchising authority may require the cable operator to rebate to subscribers the excess basic service rates charged during the pendency of appeal with interest, determined on the basis of the existing rate applicable to federal income tax refunds and payments, to compensate for the excess revenues collected when the cable system properly may have been regulated.

(5) Franchising authorities setting regulated basic cable service rates pursuant to this section shall allow a fair return on investment taking into account appropriate costs, including, but not necessarily limited to, capital costs, basic cable programming, customer service, labor, and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, increases in such costs, and the cost of any franchise-imposed requirements not directly related to the provision of cable service, as well as a reasonable profit. Franchising authorities shall presume the reasonableness of documented increases in those basic cable cost factors itemized in this "fair return on investment" standard. Franchising authorities shall retain the discretion to deny a proposed rate increase, but they shall be required to provide substantial written evidence supporting any decision to deny recovery of *bona fide*, documented increases in these itemized costs of providing basic cable service. Appeal of a franchising authority's decision shall be made to the state court with jurisdiction over such matters.

(b) In establishing any rate for the provision of basic cable service by cable systems subject to paragraph (a) of this section, the franchising authority shall:

(1) Give formal notice to the public;

(2) Provide an opportunity for interested parties to make their views known, at least through written submissions; and,

(3) Make a formal statement (including summary explanation) when a decision on a rate matter is made, and issue a written decision.

* * * * *

2. Section 76.54 is amended by revising paragraph (c) to read as follows:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. Furthermore, if a survey is undertaken pursuant to the provisions of Section 76.33(a)(2)(i) of the rules, notice shall also be served on the franchising authority. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

* * * * *

APPENDIX C

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The action is taken in compliance with the Cable Communications Policy Act of 1984, which requires that the Commission periodically review its rules regarding the regulation of basic cable service rates. While the Commission has revised its analysis of effective competition since the initial *Notice* in this proceeding, we continue to find that changes in the video marketplace since these rules were adopted in 1985 indicate a need for redefining effective competition and revising the standards for rate regulation. These modifications are enacted to ensure that franchising authorities are permitted to regulate basic cable rates in situations where a cable system has significant market power. In making these changes, the Commission has tried to adopt rules that will be easily interpreted and readily applicable, and, whenever possible, that will minimize any unnecessary regulatory burden on affected parties.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

The Chief Counsel for Advocacy of the Small Business Administration (SBA) asks that the Commission allow an exemption from the effective competition standards for small cable operators. SBA claims that the proposed rules would unfairly subject small cable systems to reregulation because they are less likely to meet any of the proposed effective competition tests than systems in large urban markets. SBA argues that, rather than using one nationally applicable standard, the Commission "should examine alternatives based on the diversity of cable systems and tailor regulations that achieve assurances of reasonable prices and quality service without imposing undue burdens on small cable operators." Furthermore, the SBA also contends that the Commission did not examine the administrative and financial burden of the proposed rules on small cable systems.

The issue of whether small cable systems should be exempt from basic service rate regulation was initially raised by Southwest Missouri Cable TV in response to the Initial Regulatory Flexibility Analysis (IRFA) in the *Notice of Proposed Rule Making* in this proceeding. In response to the *Further Notice*, other parties representing small and/or rural cable systems also propose either separate standards or exemptions from rate regulation for such systems. These proposals include exempting: (1) all systems with less than 1,000 subscribers; (2) all systems will less than 3,500 subscribers; (3) systems with 30 or fewer subscribers per installed cable mile; or (4) systems with less than $7.5 million gross revenues.

After considering the appropriate regulatory scheme for small cable systems, we have decided that we should not exempt such systems from rate regulation as proposed by commenters. Congress made no provision for such an exemption under Section 623 and the Commission lacks authority to amend Congressional enactments. Moreover,

we believe that a special effective competition standard for small, rural systems may be contrary to the Congressional directive to the Commission to establish nationwide criteria for effective competition. We make no pronouncements, however, on the Commission's ability to fashion different substantive standards for small systems.

In response to the IRFA in the *Further Notice*, the Community Broadcasters Association (CBA) claims that the Commission failed to consider the adverse impact the rules might have on small business low power television stations, especially with respect to the carriage of such stations as part of the proposed competitive behavior test. Since we are not adopting a competitive behavior test, we find this issue moot. However, we note that the revised rules will consider low power television station when assessing the availability of over-the-air signals in the cable community on a basis that is comparable to that for full service stations.

III. Significant alternatives considered:

After considering the wide range of alternatives proposed in the *Notice* and *Further Notice*, the Commission believes that the rules adopted as a result of this proceeding are the most evenhanded, balanced approach available. Consistent with the Commission's mandate under the Cable Act, we believe that the effective competition standard we are adopting will protect the public from the exercise of significant market power by cable systems in the provision of basic service and also minimize regulation that would impose undue economic burdens on cable systems. We find that six over-the-air signals will ensure the availability of a complement of signals adequate to provide effective competition to basic cable service. However, we now reject the use of the proposed penetration criterion in conjunction with the six signal standard as it will not provide a reliable indicator of poor off-air signal quality or of cable market power. We also believe that the proposed multichannel competitor test is the most appropriate for measuring the existence of alternative video providers and to ensure that the alternative service offering is a competitive presence which is likely to exert downward pressure on the incumbent's rates. The Commission further rejects, in response to the negative comments generated by the *Further Notice*, a proposal to adopt a competitive behavior test. We conclude that it would be difficult to establish benchmarks, either for a permanent test or on a transitional basis, that would objectively measure whether a cable system is operating in a competitive manner.

Regarding the rate-setting standard, the Commission considered a variety of rate-making proposals including specific methodologies, retaining the existing procedure that leaves rate-making to the discretion of the franchising authorities and a "fair return" on investment proposal. We have selected the "fair return" on investment standard because it will assist the franchising authorities in determining the factors appropriate to consider when setting cable rates, yet both preserve their control over the cable rates in their communities and provide substantial flexibility for the franchising authorities to consider the potential plethora of additional factors that might be relevant for their rate-making activity.

APPENDIX D

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* The Cable Communications Policy Act of 1984 (Cable Act) requires the Commission to periodically review its rules regarding the regulation of basic cable service rates. This proceeding was initiated to reexamine the "effective competition" standard and standards for rate regulation adopted in 1985 in light of changed circumstances in the video marketplace. In the *Further Notice of Proposed Rule Making*, the Commission sought comment on the relationship, if any, between the rules governing effective competition and the elimination of mandatory signal carriage rules for cable systems since the enactment of the Cable Act. The revised rules adopted in the *Report and Order*, in part, would deem a cable system subject to effective competition if at least six unduplicated over-the-air broadcast signals were available over the entire cable community. However, the Commission found that the record regarding the must carry issue was too limited to establish whether a link exists between effective competition and the absence of signal carriage obligations. This *Second Further Notice of Proposed Rule Making* (*Second Further Notice*) requests additional comment on this matter.

II. *Objectives.* To consider whether or not the Commission's effective competition standard is undermined by the lack of signal carriage obligations. We wish to determine whether it would be sound public policy for the Commission to further amend the effective competition rules to require cable systems to carry the six over-the-air broadcast signals considered to provide effective competition to cable service. The *Second Further Notice* seeks information that will put the Commission "in a position to know" whether, in light of the realities of the contemporary video marketplace, must carry rules are needed and, if so, whether they may be constitutionally tailored to serve a substantial government interest and thereby address the concerns articulated by the court in its decisions invalidating previous must carry rules.

III. *Legal basis.* Action as proposed for this rule making is contained in Sections 4(i),303 and 543(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(1),303 and 543(b)(3).

IV. *Reporting, recordkeeping and other compliance requirements.* None.

V. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VI. *Description, potential impact and number of small entities affected.* Depending on the action taken as a result of this proceeding, cable systems may have the additional burden of meeting signal carriage requirements as part of the effective competition standard that determines whether they are exempt from rate regulation by their local franchising authorities. However, as cable systems may or may not be rate regulated, at the discretion of the franchising authority, we are unable to estimate the number of cable systems that would be affected if new must carry rules were adopted as a result of this proceeding.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective* . None.

Separate Statement
of
Chairman Alfred C. Sikes

Re: Effective Competition to Basic Cable Service Report and Order in MM Docket No. 90-4

This *Report and Order* is very much about limits. In it the Commission has attempted to reach carefully drawn and legally defensible conclusions which are consistent with, and do not exceed, our authority under the Cable Act of 1984. That statute delineates the authority of both federal and nonfederal regulators, and in so doing limits the Commission to determining what constitutes "effective competition" to a basic tier of cable service that includes local television broadcast signals, and to prescribing standards for such regulation. The statute makes it impossible for the Commission to do more, whether or not the Commission might have been inclined to do so.

Our crafting of a balanced set of rules within the limitations contained in the Act is exemplified by the Commission's determination that certain costs, including program costs, will be presumed to be reasonable and recoverable through a basic service rate increase absent a substantial showing rebutting their reasonableness. A decision by a prior Commission allowing automatic pass through and recovery of certain costs was struck down by the court as inconsistent with the provisions of the Cable Act, and I would not support an automatic cost pass through in any event. An automatic pass through would exempt cable operators from the discipline of the marketplace, and in the end leave cable subscribers on a treadmill of automatically escalating demands on their pocketbooks. Automatic pass throughs, like "cost-plus" contracting, are a bad bargain for consumers and can be a narcotic for providers.

Permitting increased program costs to be passed through under a rebuttable presumption approach is aimed at assuring that local regulation does not frustrate national cable program development. Under the rebuttable presumption approach, however, I have several concerns about what might be termed the "ripple effect" of this presumption. It strikes me that the more we presume that program costs, regardless of their amount or their genesis, should be passed through to subscribers, the more likely we make it that system operators will not retier services in response to wholesale-level price increases, regardless of subscriber preference. As retiering in response to price increases becomes *less* likely, it becomes correspondingly *more* likely that subscribers will have their access to basic cable service tied to their taking of particular cable networks. Subscribers could thus be exposed to an unconstrained ratcheting up of the price of basic cable service to cover the increased cost of cable program services they do not want to begin with.

This presumption troubles me for a number of reasons, not the least of which is that a cable operator could choose to put a co-owned service in a basic package where demand is the most inelastic and then obtain a program cost pass-through for it, even though a relatively small percentage of the subscriber base would otherwise be interested in it. Such creative shifting of costs and profits across regulatory boundaries for the purpose of evading rate regulation was commonplace with the predivestiture Bell System. To me, therefore, it is vitally important that franchising authorities be able realistically to rebut a program cost pass-through presumption in appropriate cases, notwithstanding the fact that the Cable Act gives the cable operator wide latitude in retiering program services. The presumption of programming cost pass-through adopted in this *Report and Order* makes sense only to the extent that the standard for rebutting the presumption will be applied liberally. Just as I do not favor hamstringing the cable television industry by reregulation, neither do I favor an anti-federalistic hamstringing of local franchising authorities in the pursuit of otherwise legitimate authority.

The Commission also attempts to deal gingerly with what it views as Cable Act-imposed limitations in stating that franchising authorities will be permitted to rebate basic cable rate increases that have been imposed pending a determination of whether the system faces effective competition. I certainly support this proposition, as far as it goes. In my view this rate rollback authority should also extend to situations in which retiering has caused *effective* rate increases as, for example, where fewer channels are offered for the same price. Although the Cable Act is unclear on this point, I believe the Act, its legislative history, and prior statements by the Commission implementing and interpreting the Act's provisions are better read to say that Congress continued the authority of franchising bodies to regulate rates, with all the prerogatives that the term "regulation" reasonably includes.

The issue of limits on the Commission's authority to act is also evident in the collateral issue of must carry, which is the subject of further notice proceedings begun today. In my view, the courts in the *Quincy* and *Century Communications* cases[130] have\spoken clearly on the factual and legal predicates necessary to the reimposition of any sort of must carry regime. In reviewing the comments submitted on this matter, the Commission must be informed by those decisions. The courts have erected a series of tests for must carry to pass -- tests that will ultimately force this Commission to determine where private interests end, and the public interest begins, in maintaining local broadcasting now that cable, and not broadcast, television constitutes the dominant mode of television reception. Given the specificity of the tests the courts have found it necessary for must carry to pass, this may be the one instance where, as far as my individual assessment of the issue goes, those who advocate Commission action cannot overprove their case.

Quincy holds that, to pass constitutional muster as an incidental burden on speech, any must carry rules we devise must vindicate some important governmental inter-

[130] *Quincy Cable TV* v. *FCC*, 768 F. 2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); *Century Communications Corp.* v. *FCC*, 835 F. 2d 292 (D.C. Cir. 1987),*cert. denied*, 486 U.S. 1032 (1988).

est. This important governmental interest cannot be found to be as categorical as "the preservation of free, local television service" nor as narrow as restoring the revenue levels formerly experienced by individual stations. Instead,*Quincy* requires that must carry rules be supported by specific factual evidence showing "that without protective regulations cable subscribers would cease to view locally-available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them, and . . . that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting." *Quincy* at 1457-60.

The result of this analysis may be to show that the stations needing must carry the most are the ones that are watched the least. The court in *Quincy* also recognized this possibility, and stated that it was "far from clear" how the governmental interest in having community-oriented television outlets would be furthered only if every local station were carried. Thus, commenters advocating adoption of a must carry rule should address this particular policy question as well.

Having said all this, I will also say that I recognize that cable's potential impact on broadcasting has changed dramatically since the economic impact studies on which *Quincy* was largely based. I am also aware of, and sympathetic to, the difficulties many local stations now face in obtaining carriage on cable systems. But whether we call the governmental interest that arguably underpins must carry "localism"," effective competition to cable" or something else, in this proceeding the law and the facts, and not intuitive judgment and personal sympathies, must determine our actions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

ORDER DENYING EXTENSION OF TIME

Adopted: July 22, 1991; Released: July 22, 1991

By the Chief, Mass Media Bureau:

1. On July 16, 1991, Marti Electronics, Inc., requested an extension of time for filing comments in response to the *Notice of Proposed Rule Making* in MM Docket No. 91-140, 6 FCC Rcd 3275 (1991) (*Notice*). Comments are currently due on August 5, 1991. Marti requests that the comment date be extended to September 5, 1991.

2. Marti submits that it only recently become aware of the scope of MM Docket No. 91-140, and that the issues raised by the proceeding require in-depth study. A summary of the *Notice* was published in the Federal Register on June 7, 1991, and states with specificity the proposals advanced and the information sought by the Commission. *See* 56 Fed. Reg. 26,365 (1991). We believe that the present comment period provides sufficient time for interested parties to participate in this proceeding. We note that we recently denied a similar request submitted by the Media Access Project. *See Order Denying Extension of Time* in MM Docket No. 91-140, DA 91-899 (released July 17, 1991).

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. Marti has not set forth reasons sufficiently compelling to justify extension of the comment period designated for this proceeding.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by Marti Electronics, Inc., IS DENIED.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.204(b), 0.283 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.204(b), 0.283, 1.46.

6. For further information concerning this proceeding, contact Jane Hinckley, Policy and Rules Division, Mass Media Bureau ((202) 632-7792).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2 and 97 of the Commission's Rules Regarding an Allocation of the 216-220 MHz Band for the Amateur Service — RM-7747

ORDER EXTENDING TIME FOR COMMENTS

Adopted: July 22, 1991; Released: July 23, 1991

By the Office of Engineering and Technology:

1. On July 17, 1991, Waterway Communications System, Inc. (Watercom) requested that the time for filing comments in the above-captioned proceeding be extended from July 25, 1991 to October 23, 1991.

2. In its request, Watercom states that it is the licensee of the Automated Maritime Telecommunications System (AMTS), which operates in the 216-220 MHz band, and that it needs additional time to conduct an engineering analysis of the proposal contained in RM-7747 for a secondary allocation in this band for the amateur service. Watercom further states that counsel for the petitioner, American Radio Relay League, has been informed of its request for extension of time and does not object to the request.

3. The Commission does not routinely grant extensions of time. However, we concur with Watercom that in this instance an extension of time is warranted to fully analyze the potential for interference between amateur service use of the 216-220 MHz band and the AMTS. Accordingly, IT IS ORDERED, that the deadline for filing comments in this proceeding IS EXTENDED to October 23, 1991.

4. This action is taken pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-619

In the Matter of

Amendment of Section 73.202(b),	RM-5907
Table of Allotments,	RM-6132
FM Broadcast Stations.	RM-6322
(Gosnell and Osceola, Arkansas;	
Germantown and Ripley, Tennessee)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 22, 1991; Released: July 23, 1991

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Pollack Broadcasting Company ("Pollack") of the *Report and Order* ("*R&O*") in this proceeding, 4 FCC Rcd 6170 (1989). Ardman Broadcasting Corporation of Tennessee ("Ardman"), licensee of Station WEZI(FM), Channel 232A, Germantown, Tennessee, submitted an opposition to Pollack's petition for reconsideration and Pollack filed a reply. [1]

2. The *R&O* allotted Channel 230A to Gosnell, Arkansas, as that community's first local transmission service. The *R&O* also substituted Channel 231C2 for Channel 232A at Germantown, Tennessee, and modified the license of WEZI(FM), Germantown, accordingly. In addition, the *R&O* substituted Channel 235A for Channel 231A at Ripley, Tennessee, to accommodate the Germantown substitution. The *R&O* dismissed a conflicting proposal to allot Channel 235A to Osceola, Arkansas, as a second local FM service because no party filed a timely expression of interest for that allotment. Pollack had filed untimely comments stating its intention to apply for the Osceola channel and a petition for leave to file its comments one day late, claiming that the delay was due to a problem with the courier hired to deliver its comments to the Commission. The Chief, Allocations Branch, denied Pollack's petition for leave, noting that the party submitting comments is responsible for ensuring that documents are timely received by the Commission. The Chief also cited to *Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *recon. denied*, 4 FCC Rcd 3412 (1989), *aff'd sub nom. Amor Family Broadcasting Group v. FCC*, 918 F. 2d 960 (D.C. Cir. 1990), which states that the Commission will not consider an untimely expression of interest in an allotment in the face of a conflicting proposal. Finally, the Chief noted that even if the Commission considered Pollack's comments, the Osceola proposal for a second local FM service is mutually exclusive with a counterproposal to allot a first local FM service to Gosnell and upgraded service to Germantown. Pursuant to the Commission's FM allotment priorities,[2] first local service is of a higher priority than second local service, and therefore the Gosnell and Germantown allotments would generally be preferred over the Osceola allotment.

THE PETITION FOR RECONSIDERATION

3. In its petition for reconsideration, Pollack argues that a channel should have been allotted to Osceola. Pollack argues that under the FM allotment priorities, *see* note 2, *supra*, the allotment of an additional service to Osceola must be favored over the upgrade of the existing station at Germantown. Furthermore, Pollack claims that although an allotment to Osceola would technically constitute a second local FM service, the channel presently allotted to Osceola is a Class C1 station with its main studio in Memphis, Tennessee. Pollack argues that the station provides some service to Osceola, but it actually operates as a Memphis station. In contrast, Pollack claims that a Class A station in Osceola would provide primary service to the community. Pollack argues that the residents of Osceola have particular needs and interests that are not necessarily the same as those of residents of the metropolitan Memphis area. Therefore, Pollack maintains, the allotment of a channel to Osceola would provide the community with its only exclusively local FM facility. On the other hand, Pollack argues that a Gosnell allotment would constitute an additional service for Blytheville, Arkansas, because the two communities "blend into" each other. Pollack notes that Gosnell (population 3,215)[3] is only four miles from Blytheville (population 23,844), a community with an FM and an AM station. Pollack also argues that Gosnell is too small to support a Class A radio station on its own, given its proximity to Blytheville, whereas Osceola has the economic and population base to support a station.

4. Furthermore, Pollack claims that the allotment of a channel to Osceola could complement the operation of its Osceola daytime-only AM station. Pollack claims that, consistent with policies aimed at assisting AM daytime-only broadcasters, the Commission should consider in an allotment proceeding the possibility that a new FM allotment may provide an AM licensee with the opportunity to extend its service to the FM band.

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[1] Ardman submitted a supplement to its opposition one day after the deadline for filing oppositions. The supplement consists of a fact sheet from the Office of the Mayor of Gosnell, Arkansas, that merely verifies information contained in the opposition. Because no new material is presented, we need not consider the supplement. Ardman submitted an additional supplement approximately four months after the deadline for filing oppositions. This later supplement, which raises new arguments in opposition to Pollack's petition for reconsideration, will not be considered. The Commission's Rules do not provide for the filing of supplements to petitions for reconsideration for the purpose of presenting additional arguments. Therefore, the supplement, and Pollack's response, will not be considered.

[2] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

[3] Population figures are taken from the 1980 U.S. Census, unless otherwise indicated.

5. Finally, Pollack argues that its expression of interest and its comments should have been fully considered. The courier employed to take Pollack's comments to the Commission claims in a declaration that, although she reached the guard's desk at the Commission before the filing deadline, the attendant in the Secretary's office on the second floor refused to accept the comments, claiming that the filing deadline had passed. Pollack notes that it filed the comments early the next morning and sent copies to all parties in a timely fashion. Therefore, Pollack argues, no party was prejudiced by the late-filed comments. Pollack claims that it is a common practice for the Allocations Branch to consider late-filed comments in the interest of compiling a thorough factual record when acceptance will cause no material delay. Pollack argues that dismissal of its comments on the basis that the Commission will not consider an untimely expression of interest in the face of a conflicting proposal is ill-founded in this case. Pollack claims that as of the filing deadline there was an expression of interest filed for the allotment, [4] and, therefore," the future consideration of an allotment to Osceola was established." Pollack also argues that acceptance of late-filed comments is significantly different from acceptance of late-filed applications. Pollack claims that in the applications process, deadlines are critical for an orderly adjudication of the case and to protect the due process rights of participants, whereas in a rule making proceeding the fundamental concern is the compilation of an adequate factual record so that a valid public interest finding can be made. In this instance, Pollack maintains, no prejudice could possibly result from acceptance of its comments. Furthermore, it argues that acceptance did not delay the resolution of the proceeding and would provide the Commission with a more complete record. Pollack claims that in the absence of a public notice stating that the Commission will not consider rule making comments which," because of factors beyond the control of the commenters, are filed the morning after the comment date," its comments must be accepted.

6. In its opposition, [5] Ardman maintains that the Commission properly denied Pollack's petition for leave to file late comments, claiming that Pollack failed to demonstrate good cause for acceptance. Ardman claims that even if the courier arrived at the Commission prior to the filing deadline, she must have arrived at the Secretary's office after the deadline. Ardman cites *Waivers of Application Filing Deadlines*, 58 RR 2d 1706 (1985) and argues that the Commission will accept a late filing if caused "by a calamity of a widespread nature that even the best of planning could not have avoided," and that delay due to a delivery service difficulty is not sufficient.

7. Furthermore, Ardman argues that in *Santa Isabel* the Commission stated that it would not consider untimely comments containing an expression of interest in a proposed allotment if the proceeding involves a conflicting proposal. Ardman also cites *Julian, California*, 50 Fed. Reg. 16704 (1985), which states that the Commission does not routinely grant extensions of time to file comments in rule making proceedings. Ardman distinguishes cases in which the Commission accepted late-filed reply comments, as opposed to latefiled expressions of interest.

8. Ardman maintains that even if the Allocations Branch accepted Pollack's late-filed comments, the Osceola allotment would not be granted because the Gosnell and Germantown allotments are preferable under the FM allotment criteria. Ardman argues that the Gosnell allotment represents a first local transmission service, whereas the Osceola allotment represents a second local transmission service. Ardman notes that Gosnell is an incorporated community with its own mayor, municipal government, police department, volunteer fire department, school system, sewer system, a Lion's Club, and a variety of business enterprises such as a grocery store, bank, and credit union. Ardman argues that Pollack's claim that the Gosnell station is in reality an allotment to Blytheville is irrelevant, citing to *Greenwood, North Carolina*, 2 FCC Rcd 3583 (1987) (argument that a proposed allotment would be a service to a contiguous larger community found to lack merit) and *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy* ("*Suburban Community Policy*"), 93 FCC 2d 436 (1983). Ardman claims that Gosnell is not a "quiet village", citing *Report and Order (Bartow, Georgia)*, 4 FCC Rcd 6876 (1989) (a community of 350 persons was not a "quiet village" because it was self-governing and provided municipal services).

9. Ardman argues that the Osceola proposal should not be treated as a proposal for first local service since there is both a Class C1 FM and an AM station licensed to the community. Finally, Ardman claims that the Commission should not consider the potential preference for Pollack's Osceola daytime-only AM station in this allotment proceeding. Ardman maintains that any preference that Pollack may have in a comparative hearing regarding its AM station should not be relevant in an allotment proceeding, because Pollack may not be the licensee of the allotment. If such a factor was to be considered, Ardman suggests it should fall under the fourth allotment criteria of other public interest matters.

10. In reply, Pollack claims that Ardman fails to negate its arguments that Section 307(b) mandates an allotment to Osceola over Gosnell. Pollack claims that Ardman's references to *Suburban Community Policy* are inapposite because the policies deleted in that proceeding were applied in the context of applications for new or modified facilities. Pollack claims that the principal rationale for the elimination of the policies was that such considerations were more properly treated and resolved in the rule making context. Therefore, the *Suburban Community Policy* proceeding did not mean that Section 307(b) issues would be ignored in allotment proceedings. Furthermore, Pollack argues that the elimination of the *de facto* allotment policy in that proceeding was motivated by the concern that the policy allowed licensees in larger com-

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[4] This expression of interest, filed jointly by Hodges and Medlin, was subsequently withdrawn.

[5] As a threshhold matter, Ardman claims that Pollack's petition for reconsideration was untimely filed pursuant to Commission rule 1.4(b)(3). Ardman is incorrect. Filing deadlines following *Report and Orders* released in allotment rule making proceedings are governed by Commission rule 1.4(b)(1), which states that the date of public notice is the date of publication in the Federal Register. A summary of the *R&O* was published in the Federal Register on August 14, 1989, 54 Fed. Reg. 33227 (1989). Accordingly, the filing deadline for petitions for reconsideration was September 14, 1989, and when Pollack filed its petition for reconsideration on September 13, 1991. Therefore, Pollack's petition for reconsideration was timely filed.

munities to hamper modifications by licensees in smaller communities. However, Pollack maintains that elimination of the policy magnified the significance of the Section 307(b) analysis in rule making proceedings. Pollack argues that the real issue in this proceeding is not whether a future licensee of the Gosnell station can aim for the Blytheville market, as Ardman suggests, but whether Gosnell, rather than Osceola, is deserving of the new channel.

DISCUSSION

11. The threshhold issue in this case is whether the Commission's staff should have considered Pollack's late-filed comments and expression of interest. As an initial matter, we reiterate that it is the responsibility of the party submitting comments to ensure that the documents are delivered to the Commission on time. We see no reason to excuse Pollack's failure to meet a filing deadline when the reason for delay is attributed to a problem with its courier service. [6]

12. The *R&O* correctly stated that the Commission will not consider an untimely expression of interest in the face of a conflicting proposal. Parties are generally required to file expressions of interest in an allotment before the expiration of the initial comment date. Failure to participate places potential applicants for that allotment at risk that no party will file a timely expression of interest or that a party may, as here, withdraw its expression of interest. The Commission will accept late-filed comments supporting an allotment proposal only where there is no opposition to the proposal and where there would be no adverse impact on another pending proposal. This policy, stated in *Santa Isabel,* has been expressly upheld by the Court of Appeals. *See Amor,* 918 F. 2d at 963.

13. However, a recent Commission engineering analysis has determined that Channel 297A is available for allotment to Osceola. As a result, acceptance of Pollack's late-filed expression of interest in an Osceola allotment would not adversely affect any pending allotment proposal or the decisions reached in the *R&O.* Therefore, consistent with the precedent stated in *Santa Isabel,* we will accept Pollack's late-filed expression of interest. [7]

14. We believe the public interest would be served by the allotment of Channel 297A to Osceola as that community's second local FM transmission service. Channel 297A can be allotted to Osceola with a site restriction of 3.4 kilometers (2.1 miles) northeast of the community to prevent short-spacings to Station KFTH, Channel 296A, Marion, Arkansas, and to Station KFIN, Channel 300C1, Jonesboro, Arkansas. [8]

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Section 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective September 6, 1991, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

Community	Channel No.
Osceola, Arkansas	251C, 297A

16. The window period for filing applications for Channel 297A at Osceola will open on September 9, 1991, and close on October 9, 1991.

17. IT IS ALSO ORDERED, That the petition for reconsideration filed by Pollack Broadcasting Company IS GRANTED IN PART.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information regarding this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

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[6] Indeed, the Commission recently refused to accept a petition for reconsideration that was filed three minutes late, a delay that was attributed to "computer error." *Mary R. Kupris,* 5 FCC Rcd 5142 (1990).

[7] The availability of an alternate channel for allotment to Osceola removes the need to comparatively consider the merits of the proposals in this proceeding.

[8] Coordinates for Channel 297A at Osceola are North Latitude 35-43-03 and West Longitude 89-55-58. Applicants for Channel 297A at Osceola may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KFTH, Channel 296A, Marion, Arkansas, Station KLQZ, Channel 296A, Paragould, Arkansas, Station KFIN, Channel 300C1, Jonesboro, Arkansas, vacant but applied for Channel 298C3 at Campbell, Missouri, the application (BMPH-910409IB) for Channel 298C3 at Campbell, and the following applicants for Channel 298A, Germantown, Tennessee: BPH-870908MV, BPH-870908MJ, BPH-870908MN, BPH-870908MY, and BPH-870904MS.

RULE CHANGES APPENDIX

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-96

In the Matter of

Amendment of the Commission's Rules
Relative to Allocation of the
849-851/894-896 MHz Bands

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1991; Released: July 11, 1991

By the Commission: Commissioner Barrett issuing a separate statement.

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INTRODUCTION

1. By this action, the Commission grants in part petitions for reconsideration of the *Report and Order* in this proceeding.[1] The petitions were filed by McCaw Cellular Communications, Inc. (McCaw) [2] and GTE Airfone Incorporated (GTE).[3] This action should ensure greater opportunity for competition in the 800 MHz air-ground radiotelephone market. Additionally, we are adding and amending certain technical rules to enable new air-ground licensees to commence service while GTE replaces its experimental system with a system that conforms with the rules adopted in the *Report and Order*.

BACKGROUND

2. On April 12, 1990, the Commission adopted a *Report and Order* in this proceeding establishing an air-ground radiotelephone service that is to operate on the 849-851/894-896 MHz frequency bands. To promote competition, the Commission adopted an open entry licensing policy that facilitated the entry of new air-ground service providers.[4] The Commission also adopted channel and ground station plans. The channel plan adopted contains ten channel blocks, each with 31 communications channels and four control channels. The Commission provided for sharing of the air-ground frequencies by specifying that all air-ground licensees would be allowed equal access to the communications channels. Under the plan adopted, each licensee would be assigned an exclusive control channel. Additional control channels, if more than four licenses were granted, would be created from the communications channel(s) adjacent to the control channels in each channel block. The Commission also established a 12 month transition period for GTE to modify its experimental system equipment by reducing the control channel bandwidths from 14 kHz to 3.2 kHz, as specified in the rules. Further, the Commission preempted state regulation of technical and operational standards on all 800 MHz air-ground radiotelephone service communications, and of rates and conditions of entry and exit in that service with respect to intrastate communications on interstate airline routes. The Commission did not preempt state regulation of rates and conditions of entry and exit with respect to intrastate air-ground communications on intrastate airline routes.[5]

3. McCaw and GTE filed petitions for reconsideration of certain aspects of the *Report and Order*. McCaw requests that the Commission invalidate GTE's airline contracts entered into prior to the release of the *Report and Order* and grant other licensees interim access to GTE's system to allow them to engage in the resale of air-ground services. GTE requests an extension of the transition pe-

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[1] *Report and Order* in GEN Docket No. 88-96, 5 FCC Rcd 3861 (1990).

[2] Subsequent to filing its petition, McCaw formed a limited partnership with Hughes Network Systems, Inc. to form a new company, Clairtel Communications Group, L.P. (Clairtel) to provide air-ground service.

[3] *See Petitions for Reconsideration*, GEN Docket No. 88-96, filed by McCaw and GTE on July 26, 1990.

[4] In the *Report and Order*, the Commission established a deadline of October 15, 1990, for the filing of applications for a nationwide license in the 800 MHz Air-Ground Radiotelephone Service. The Commission subsequently extended the deadline to October 22, 1990. Six applications were timely filed. Licenses were granted to American Skycell Corporation (Skycell), Clairtel, In-Flight Phone Corporation (In-Flight), JET-TEL Group, L.P., and Mobile Telecommunications Technologies Corporation. A license that is subject to the conditions specified in paragraph 8, *infra*, will be granted to GTE subsequent to this Memorandum Opinion and Order.

[5] *See Report and Order, supra*, at paragraph 36.

riod for GTE to change its system from experimental to regular service, additional federal preemption of state regulation of air-ground communications, and a number of changes in the technical rules. Further, both McCaw and GTE request direct FCC involvement in the resolution of technical problems that may arise during the implementation of the next generation of air-ground technology.

DISCUSSION

GTE's Preexisting Airline Contracts

4. In its petition, McCaw states that the pool of airlines free to negotiate contracts with other applicants for air-ground service is severely depleted as a result of contracts made with GTE during the term of GTE's experimental license. Additionally, McCaw states that these contracts are anticompetitive and impede other applicants from entering the air-ground market because they contain restrictive provisions that obligate the airlines to use GTE exclusively for air-ground service. Therefore, it requests that the Commission declare any restrictive provisions in these contracts void. In-Flight, in support of McCaw, maintains that GTE has contracts with 12 of the 13 largest airlines, effectively controlling 85 percent of the air-ground market. Both McCaw and In-Flight argue that with the pool of available airlines depleted, new service providers will find it extremely difficult, if not impossible, to compete with GTE. Skycell generally concurs with McCaw and In-Flight.

5. GTE replies that its contracts do not impede entry by new competitors. It states that most of its contracts restrict only the installation of cordless/bulkhead telephones, not the more desirable seatback telephones.[6] Specifically, GTE states that as of August 29, 1990, the date of its Reply, only 118 out of 4,500 domestic aircraft are covered by contracts that do not allow other air-ground licensees to install seatback telephones.[7] GTE also argues that within the next few years, 10 percent of the existing aircraft will be retired and new aircraft totaling 20 percent of the domestic fleet will be delivered. GTE claims that these new aircraft represent a significant marketing opportunity for the new air-ground licensees.

6. Subsequently, in an *ex parte* presentation, GTE expressed interest in resolving the concern raised over its contracts. Specifically, GTE stated that it has notified, in writing, all airlines with which it entered into contract prior to June 15, 1990, that GTE will not obligate them to purchase or use additional equipment or services from GTE for any aircraft not already equipped with cordless/bulkhead or seatback telephones, but that GTE will continue to fulfill its remaining contractual obligations. Previously, GTE had informed airlines with GTE installed equipment that they could purchase the equipment at book or market value in order to release the airline from any obligation to use the GTE air-ground service.[8]

7. Upon review of the pleadings and *ex parte* communications, we find a basis for concern that prior contracts may inhibit the development of a competitive air-ground service. GTE entered into contracts with the airlines pursuant to its experimental license when it had a *de facto* monopoly on airground service. Many of these contracts terminate after December 24, 1990, when specific competing 800 MHz air-ground carriers were first licensed. Certain contracts GTE has entered into with the airlines contain clauses that can be interpreted to restrict that airline's entire fleet of aircraft to GTE equipment, or to restrict that airline to connection with only the GTE ground network. Such contracts appear to bind airlines to GTE not only for all previously equipped aircraft, but also for all non-equipped aircraft. Furthermore, while the number of aircraft bound to GTE by contract may be less than stated by In-Flight, it is still substantial. We agree that the important public interest concerns of promoting competition and customer choice in airground service would be impeded by the long-term contracts negotiated by GTE pursuant to its experimental license. At the same time, we are cognizant that disruption of existing air-ground service might occur were we to void GTE's contracts in their entirety. Accordingly, we will not take such action but we do recognize the significant competitive advantage that was created by GTE by its negotiating long term, exclusive contracts while operating under its experimental authority and conclude that some regulatory action is necessary to mitigate that advantage.

8. While the letters sent by GTE may permit an airline choose an alternative licensee for any of its fleet not yet installed with air-ground equipment, they do not provide the airline freedom to have the GTE equipment removed that was installed under GTE's experimental license in order to have another licensee equip that aircraft. When the Commission allowed GTE to enter into service contracts under its experimental license, it did not envision GTE's entering into contracts that would bind airlines exclusively to GTE for periods exceeding the term of the experimental license.[9] We find it contrary to the public interest for GTE to restrict competition by binding airlines to exclusive contracts with termination dates exceeding the term of GTE's experimental license or to require airlines to pay premature contract-termination penalties.[10]

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[6] GTE's cordless/bulkhead telephones require passengers to leave their seats to initiate telephone calls. According to GTE, the demand for that service is reduced when seatback telephones are available.

[7] In August 1990, only 118 aircraft had seatback telephones installed. However, by February 1991, *ex parte* communications with GTE indicated that the figure had jumped to 316 aircraft with seatback telephones.

[8] In a recent *ex parte* presentation, Clairtel proposed an "open season" that would permit air carriers to unilaterally terminate contracts with all airground service providers until June 30, 1992. *See* Clairtel *ex parte* presentation, May 29, 1991. GTE responded that for a six month "open season" it would voluntarily permit air carriers to amend contracts signed before the Commission's June 15, 1990, Report and Order on an aircraft-by-aircraft basis to provide for a change in service provider. *See* GTE *ex parte* presentation, June 7, 1991.

[9] Part 5 of the Commission's rules does not confer any right to conduct an activity of a continuing nature. To the extent that GTE bound itself to provide service beyond the term of the experimental license it did so at its own peril. Furthermore, a Part 5 experimental license may be cancelled at any time without hearing if, in the judgment of the Commission, such action should be necessary. *See Airfone, Inc.*, 60 RR2d 1489 (1986).

[10] GTE's offer to sell to an airline installed equipment in exchange for an early termination of a contract is insufficient to rectify competitive problems caused by these service contracts. There is no reason to believe that the airlines or competing

Further, we believe the quantity of aircraft equipped by GTE since the release of our *Report and Order* on June 15, 1990, is substantial.[11] To allow competition to develop fully in the air-ground market, airlines need to be able to terminate, at their option and without penalty, contracts entered into with GTE prior to December 24, 1990,[12] for equipment installed prior to release of this Memorandum Opinion and Order, regardless of the contract termination provisions. The airline or the new service provider selected by the airline will be responsible for the costs of removing the GTE equipment and will be required to return the removed equipment to GTE. In order to effect this freedom and to ensure that GTE refrains from enforcement of the restrictive provisions, appropriate conditions are being imposed on the air-ground license that will be granted to GTE.[13] Such conditions will include a requirement that GTE notify, within 30 days, all affected parties that the relevant contractual provisions will no longer be enforced.[14]

Interim Access and Resale

9. McCaw also contends that by adopting a technical framework that allows the GTE experimental system to continue without interruption, the Commission has provided GTE with a substantial head start over the other licensees. It argues that in order to reduce this advantage, other licensees should be allowed interim access to GTE's system for the purpose of reselling air-ground service to the airlines. In reply, GTE states that it is willing to make its service available for resale. However, GTE cautions that it plans to begin a transition to a second generation air-ground system, and resellers will be required to duplicate this technological evolution.

10. We believe that the situation with regard to the implementation of air-ground service is similar to that which existed during the early development of cellular radio. There the Commission found it necessary to require the resale of cellular radio service in order to develop a competitive market.[15] We believe that GTE's headstart and competitive advantage is such that it is necessary to require the resale of GTE's air-ground service to facilitate the entry of other air-ground providers. Accordingly, we are requiring GTE to make its service available to the other air-ground licensees for resale at non-discriminatory rates based upon our current resale policies.[16] We believe this plan will assist the new licensees in initiating service and thereby promote the development of a competitive air-ground market.

Channel Plan

11. GTE observes that the channels listed in the *Report and Order* correspond to the carrier frequencies of its experimental system, which utilizes asymmetrical modulation of -1.5 kHz, +4.5 kHz, and not to the center frequencies of its system's channel plan. GTE also notes that there is an overlap of 200 Hertz between communications channel C-1 and control channe P-4. It states that new systems based on the channel plan in the rules would overlap with its experimental system and result in mutual interference. Therefore, GTE requests that the center frequencies listed in the *Report and Order* be increased by 1.5 kHz to be consistent with the channels of its experimental system.

12. Subsequent to its petition, GTE submitted a new channel plan that would permit its transition and also accommodate the immediate entry of new air-ground licensees.[17] This channel plan would keep the communications channel center frequencies consistent with its experimental system but would move the control channels from the lower end to the upper end of each of the ten channel blocks. Thus, it would make control channels immediately available for all six licensees. This would allow new licensees to initiate service without waiting for GTE to complete its control channel bandwidth conversion. During the transition period, however, GTE would continue to operate its experimental system on the wideband (14 kHz) control channel at the lower end of each channel block while it concurrently brings its new narrowband control channel equipment into service. GTE's new equipment would use one of the new control channels at the upper end of each channel block. This plan would provide 29 communications channels per block.

13. GTE's plan would require recovery of two control channels, *e.g.*, two license cancellations, to obtain one additional communications channel. In-Flight, in an *ex parte* presentation, requests minor modifications to GTE's proposed channel plan that would allow the creation of

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air-ground service providers would be willing to purchase this equipment that even GTE admits is obsolete and not state of the art. Nevertheless, we do not consider it overly burdensome for the airline or the new service providers to bear the cost of removing the GTE equipment. *See* discussion, this paragraph, *supra*.

[11] GTE states that it has installed equipment on 650 aircraft since June 15, 1990. *See* GTE *ex parte* presentation, June 7, 1991, at page 2.

[12] The Commission granted the first air-ground licenses to four new service providers on December 24, 1990. Accordingly, this is the first date that the airlines were able to identify the specific service providers that would compete with GTE.

[13] On December 5, 1990, in response to an application filed by GTE for a regular license, Skycell filed a Petition for Conditional Grant requesting relief with respect to the contracts GTE secured under its experimental license. Section 303(r) of the Communications Act of 1934 authorizes the Commission to apply such conditions to the grant of a license as may be necessary to further the public interest, convenience, or necessity, 47 U.S.C. , Section 303(r).

[14] We recognize that additional cost to GTE may result from this decision because a carrier may elect to remove equipment from its aircraft before the equipment has been fully depreciated by GTE. Nevertheless, the importance of ensuring a competitive air-ground market is paramount and outweighs these additional costs. The potential financial burden on GTE is, however, somewhat eased by our requirement that the airline or any new service provider(s) selected by an airline absorb the costs of removing and returning to GTE equipment from affected aircraft.

[15] *See Report and Order* in CC Docket No. 79-318, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), appeal dismissed *sub nom. U.S. v. FCC*, No. 82-1526 (D.C. Cir. 1983). *See also Notice of Proposed Rule Making and Order* in CC Docket No. 91-33, 6 FCC Rcd 1719 (1991).

[16] *Report and Order*, 86 FCC 2d 469 at 511; *see also* 6 FCC Rcd 1719, 1724 at para. 44.

[17] *See* GTE *ex parte* presentation made November 9, 1990. The transition process set forth in the *Report and Order* requires GTE to complete a conversion to 3.2 kHz bandwidth control channels. The new providers cannot initiate service on their systems until this conversion is completed.

an additional communications channel if only one provider cancels its license.[18] In-Flight's proposal would alter the guardband scheme in GTE's plan.

14. Clairtel, also in an *ex parte* presentation, proposed an alternative channel plan to those of GTE and In-Flight.[19] It proposes moving the center frequencies of the communications channels and using 3 kHz bandwidth control channels. It states this will provide one more communications channel in each channel block, for a total of 30 communications channels per channel block. Clairtel argues that an additional advantage of its plan is that all the center frequencies fall on a multiple of 1 kHz, thus making equipment design simpler. However, GTE notes that this channel plan is incompatible with its experimental system. To avoid interference during GTE's transition, Clairtel proposes that the communications channels be divided between GTE's existing experimental operations and those of the new licensees. GTE opposes this option, stating that even with a 50 percent spectrum split, 44 percent of its stations would experience blockages during peak hours.

15. The channel plan adopted in the *Report and Order* was intended to be consistent with GTE's experimental system. The 1.5 kHz difference between the center frequencies of the channel plan adopted in the *Report and Order* and GTE's experimental system and the 200 Hertz overlap resulted from misinterpretations of GTE's experimental system channel plan. We continue to believe that it is in the public interest to accommodate GTE's experimental system in the new channel plan to allow for a smooth transition. Therefore, we will increase the center frequency of each communications channel by 1.5 kHz to ensure that all systems will be frequency compatible. We find that modifying the channel plan as suggested by GTE and In-Flight will better accommodate the needs of both GTE and the new licensees. These changes will accommodate GTE's transition from its experimental system to its regular system and will allow the new licensees to initiate service as soon as they are ready. Further, it has the potential to provide an additional communications channel in each channel block if one licensee returns its license to the Commission or if only five licensees construct their systems. We are not adopting Clairtel's proposed plan, because it is inconsistent with the communications channels used in GTE's experimental system.

16. To implement the new channel plan, we will shift the current location of the control channels to the upper end of each channel block. To accomplish this, we are reassigning communications channels C-28 through C-31 from each block for control channels. This will supply spectrum for six control channels and guardbands to compensate for oscillator instability and intercell Doppler shift. This plan will limit the number of communications channels to 26 (new C-4 through C-29) during the GTE transition. After this transition, three more communications channels (new C-1, C-2 and C-3) will be created from the 20kHz now used by GTE for the control channel and guardbands in its experimental system. The new channel plan is set forth in revised Section 22.1107 of the Rules.

Transition Provisions

17. In its petition, GTE states that the 12 months granted for its transition period is unrealistically short. It argues that redesigning, procuring, testing, and refitting all of its ground stations and approximately 1,400 aircraft with new air-ground equipment capable of utilizing a narrower control channel involves nearly 6,000 transceivers and will take considerably longer than 12 months. Further, in an *ex parte* presentation, GTE states that it plans to replace its experimental system with a second generation digital system and that this will require five to six years to implement.[20] It claims the time for this transition is driven by two factors: 1) the development and manufacturing lead time for new digital equipment, which will be approximately two years; and 2) the scheduling of aircraft for retrofitting, which will require considerable coordination with the airlines.[21]

18. GTE proposes two alternative plans for the transition from its experimental system to a regular system that conforms with the rules. GTE's preferred approach is a single step transition in which it would replace its existing equipment with new digital equipment. This new equipment would use 3.2 kHz bandwidth control channels located at the top of each channel block. GTE states that this option would allow it to continue operating its current system without further modifications during the transition. However, recognizing that until the entire transition is complete this plan would occupy the lower 20 kHz of each channel block to accommodate the control channel of its experimental system, GTE also proposed an alternative plan that would provide for a dual-track transition. Under this option, GTE would reduce the experimental system's control channel bandwidth to 3.2 kHz at the current control channel location at the lower end of each channel block. Concurrently, GTE would begin replacing its experimental equipment with new equipment that would use one of the new control channels located in the upper portion of each channel block. GTE states that in approximately 22 months all experimental equipment would be modified for 3.2 kHz bandwidth operation in the lower portion of each channel block. This would free two communications channels from the existing control channel. GTE would continue to use one of the new communications channels to accommodate its experimental control channel at the lower part of each channel block until all of its equipment was replaced by new equipment. GTE notes this alternate plan involves two aircraft retrofits, is more complicated and costly, and still requires the same time for transition, but will make available two additional communications channels after 22 months. These two communications channels would not be available for five to six years under the first alternative. At a joint technical meeting, the other licensees expressed concern regarding the GTE request that it be allowed five to six years for its transition, noting that they are required to build at least 25 ground stations within three years.[22]

19. GTE's transition from its experimental system to a system that conforms with the rules is a considerable undertaking. We recognize that in order to maintain service to existing customers, GTE will be required to op-

[18] *See* In-Flight *ex parte* presentation, December 18, 1990.
[19] *See* Clairtel *ex parte* presentation, March 8, 1991.
[20] *See* GTE *ex parte* presentation, February 6, 1991.
[21] GTE indicates that additional delays may occur if FAA recertification is required.
[22] At the request of the Commission's staff, a meeting was held

erate two systems simultaneously: its experimental system using two control channels in the lower portion of each channel block, and its new system using a control channel in the upper portion of each channel block. We are persuaded that the large quantity of equipment requiring modification and/or retrofit, coupled with GTE's implementation of new equipment, will require a longer transition period than the 12 months granted in the *Report and Order*. Further, we are concerned that if GTE is required to cease operation because the transition period is too short, the public, including customers of providers using resale of GTE's service, would temporarily lose air-ground radiotelephone service. However, we are also concerned about the effect of the reduction in available communications channels while GTE is making its transition. In this regard, we note that In-Flight stated in its license application that it will be ready to begin testing by March 31, 1991, and that it will have an operating system by June, 1991.[23] On this basis, we will adopt GTE's alternative plan and grant it 22 months, from the effective date of this Memorandum Opinion and Order, to modify its current equipment for narrow control channel operation (3.2 kHz bandwidth) in the lower portion of each channel block and 60 months, from the effective date of this Memorandum Opinion and Order, to bring its operations into full compliance with the rules. While this approach will be somewhat more costly to GTE, we believe that these costs are outweighed by the need to make communications channels available as quickly as possible. Accordingly, we are adding a new Section 22.1121 to the rules to specify the transition provisions for the GTE system.

20. GTE also questions whether or not it is permitted to continue using the Part 15 cordless telephones of the experimental system during the transition period. These cordless telephones operate on frequencies of 1.59/1.80 MHz and 49.22/49.56 MHz. In its recent rewrite, the Commission allowed operation of Part 15 devices at these frequencies.[24] Therefore, cordless telephones that comply with the appropriate Part 15 standards and are approved under the Commission's equipment authorization requirements may be used.[25]

Additional Federal Preemption

21.GTE requests that the Commission extend its preemption of state regulation of air-ground communications to include all aircraft that fly interstate routes. The effect of this request would be to extend the preemption of state regulation to intrastate calls on intrastate airline routes if the aircraft involved is also used on interstate airline routes. For those aircraft, GTE states that there is no practical way to determine whether a call is interstate or intrastate. GTE contends that call classification by flight number would not be reliable because flight route information constantly changes. It submits that to keep track of these changes would require the creation and maintenance of a large and unwieldy computer data base. GTE acknowledges that calls on the experimental system are classified by the unique aircraft registration number. However, it states that aircraft identification alone does not always indicate whether a call is interstate or intrastate because aircraft get reassigned from their normal routes. Consequently, GTE recommends that the Commission preempt state regulation of air-ground communications from all aircraft except: those owned by a carrier that flies only within a state, or those aircraft, as identified by the airline(s), that always travel routes within a single state.

22. We understand the difficulties involved in determining whether the air-ground communications are intrastate or interstate. However, the states have not expressed any inclination to regulate air-ground communications, and therefore we do not believe it necessary to extend our preemption policy at this time. We will not act with regard to additional preemption of state regulation unless and until a specific situation arises that requires our consideration.

Control Channel Bandwidth

23. GTE argues that the 3.2 kHz bandwidth provided for control channels is insufficient for anticipated future signaling needs. According to GTE, future signaling needs will require a control channel bandwidth of 6 kHz to include aircraft identification, network control, handoff, maintenance, and billing information. GTE submits that these signaling messages will occupy 50 bytes per packet and that the data rate necessary to transmit this packet will be 3.5 kilobits per second. GTE states this data rate would nominally require a bandwidth of 4.7 kHz; however, with additional compensation for Doppler shift and oscillator instability, the total bandwidth necessary for signaling will be 6 kHz.

24. Both McCaw and In-Flight oppose GTE's request to increase the control channel bandwidth. In-Flight argues that signaling messages related to individual call set-up and tear-down should be transmitted on the particular communications channel involved, and that the control channels should be used only for system signaling messages. It states that doing so reduces the required bandwidth for the control channels. McCaw maintains that GTE's request to reserve more spectrum for possible future signaling needs is premature, and may be unnecessary because much less continuous data transfer is currently required and the demands of future signaling operations are uncertain.

25. We continue to believe that the 3.2 kHz control channel bandwidth adopted in the *Report and Order* is sufficient for the signaling needs of the air-ground service. As indicated by the commenting parties, additional signal messages and information necessary for call set up, billing information, etc., can also be sent over communications channels. Further, we are concerned that expanding the control channels to 6 kHz would mean the loss of 3 communications channels, which would reduce overall capacity for service to the general public. We also agree with McCaw that it would be premature to provide spec-

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on March 25, 1991, to address several technical issues. This meeting was attended by representatives from all six air-ground licensees.

[23] Clairtel and Skycell indicated that they will be ready within one and two years, respectively.

[24] *See, First Report and Order* in GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989) and 47 CFR 15.209.

[25] We will permit GTE six months from the effective date of this decision to obtain the necessary approval of this equipment or to replace the equipment with that which has been approved.

trum now for as yet undetermined future increases in control channel data transmission rates. As pointed out by McCaw, the need for this capacity might never develop. We believe the appropriate time to consider expanding the control channel bandwidth is if and when there is the need for such capacity. Accordingly, we are denying GTE's request to expand the control channel bandwidth to 6 kHz.

Ground Station Locations

26. GTE states that the Commission's listing of GTE's ground stations in Section 22.1109 of the Rules is incomplete and contains incorrect coordinates for a number of ground station locations. It also asserts that several existing ground station locations are missing from the Commission's list. McCaw asks that GTE not be allowed to add new stations without going through the coordination process adopted in the *Report and Order*.

27. The listing of GTE's ground stations in the *Report and Order* was based upon the information available to the Commission at the time that decision was adopted. Since then, we have verified that 16 locations authorized prior to June 15, 1990, were omitted. Therefore, we are modifying the rules to include these missing locations. We also have corrected coordinates.

Coordination of Available Channels

28. The rules adopted in the *Report and Order* to govern the procedures for selection and use of the communications channels are intended to allow competing air-ground systems employing entirely different technologies to coexist in the same band. Section 22.1115 of the Rules requires radio frequency (rf) signal monitoring to ensure that ground stations will not transmit on a communications channel that is already in use.[26] GTE requests that the Commission amend this rule to require that all air-ground licensees establish land-links among the ground stations in each location for the purpose of coordinating available channel information. According to GTE, independent rf signal monitoring, as required in the *Report and Order*, would be an unreliable method of determining which channels are available at a given location. It states, for example, that aircraft ground transmissions could be blocked by buildings in the vicinity of airport terminals. Further, GTE is concerned that the received signal level standard in Section 22.1115(a) for determining channel availability through monitoring could preclude use of future equipment that could detect a lower signal level. GTE also requests clarification as to whether the rules require continuous monitoring or if they permit scanning in regard to the detection of hang-up signals. Further, GTE is concerned that the use of a 15 second delay interval to determine channel availability as an alternative to hang-up signal detection would result in a loss of capacity.[27]

29. Neither Clairtel nor In-Flight believes that it is necessary for the licensees to share available channel information in order to determine when channels are available. According to these two parties, the requirement that new air-ground providers' ground stations be located within one mile of GTE's existing ground stations and the fact that structures in the vicinity of airports are relatively low in height render it unlikely that 895 MHz air-ground signals will degrade to the levels envisioned by GTE. A better solution, according to In-Flight, is for the air-ground licensees to monitor the transmissions from each other's base stations to determine whether a channel is in use.

30. Monitoring the rf signals, particularly of ground stations, is a reliable means for determining channel availability. Structures around airport terminals will not attenuate a 100 watt effective radiated power signal so severely that the signal cannot be detected by a receiver or scanner specifically designed to monitor it that is located within two miles. Further, a Commission requirement for land-link coordination would be excessively burdensome and expensive for all of the licensees. Accordingly, we reject GTE's request for a land-link requirement.

31. We recognize GTE's concerns with regard to the potential for the signal threshold standard to affect the introduction of more sensitive equipment in the air-ground service. Nonetheless, we believe a threshold standard is necessary to assist the licensees in determining whether a channel is occupied. We continue to believe that the -115 dBm signal threshold is appropriate for determining the presence of a signal. This signal level is near the threshold of sensitivity (the weakest signal that can be detected) in typical receivers currently available for operation in the 850-900 MHz range. If and when the state of the art in air-ground receiver technology advances to the point where the consensus of the air-ground licensees is that this level is too high, we would entertain a proposal, supported by technical justification, that the -115 dBm guideline be reduced or modified as appropriate.

32. In response to GTE's concern with the requirements for detection of a hang-up signal, we note that the rule does not require a specific monitoring procedure for detecting the hang-up signal. The hang-up signal or the 15 second delay merely establishes the conditions that define when a ground station terminates a call and relinquishes the channel.[28] The licensees have the flexibility to design their systems as they wish to determine if either of these conditions have occurred. This could include continuous monitoring or scanning, in accordance with the operating designs of individual systems. Further, the Commission anticipated that licensees might wish to employ an alternative common hang-up signal that can be recognized by all licensees. The existing rule permits the use of such a signal. Another alternative approach would be for a sys-

[26] A communications channel is not available for use by a ground station if the received signal power on that channel at the ground station exceeds -115 dBm, assuming a 0 dB gain 895 MHz receive antenna. Ground stations other than the one from which service has been requested must consider the communications channel to be unavailable until either a hang-up signal is transmitted by the airborne mobile station, or the received signal power on that channel drops below -115 dBm for a period of at least 15 seconds. *See* Sections 22.1115(a) and 22.1115(d) of the Rules.

[27] *See* GTE Reply Comments at Appendix B, page 15.

[28] The licensee providing service will continuously monitor the airborne mobile station to detect the hang-up signal. It will terminate the call if either: 1) the hang-up signal is received, or 2) the radio signal from the airborne mobile station is lost for more than 15 continuous seconds.

tem to be designed to recognize the hang-up signals of all the other systems operating. Thus, the rules permit use of a variety of approaches to avoid the need to wait 15 seconds to determine if a channel is available.

Communication with Aircraft on the Ground

33. Section 22.1109(a) of the Rules permits any of the ten channel blocks to be used for low power communication with aircraft on the ground, provided that the ground station meets certain technical requirements designed to limit skyward radiation.[29] GTE argues that these technical requirements might not be effective in preventing interference to airborne mobile stations due to reflections from nearby structures and the ground. Further, GTE states that the "dramatic" attenuation pattern specified in Section 22.1109(a) would be difficult to design.[30] GTE argues that radiotelephone service to aircraft on the ground should be provided only in accordance with a specific allotment plan that is coordinated with the initial channel block layout. GTE states that it plans to develop a second generation ground station plan with a different reuse pattern, and states that this plan will specifically provide for communication with aircraft on the ground. Therefore, GTE asks that Section 22.1109(a) and the last sentence of Section 22.1117 of the Rules, which limits to 5 watts the ERP of ground transmitters in communication with mobile stations on the ground, be deleted from the rules and reuse of channel blocks for ground communication not be authorized until its second generation ground plan is implemented.

34. In-Flight opposes GTE's request. It proposes an alternative plan that would protect airborne mobile stations by a worst case desired-to-undesired signal ratio of at least 30 dB at the receiver of an airborne mobile station. Additionally, ground stations providing service to aircraft on the ground would be required to be at least 150 miles from other ground stations using the same channel blocks to communicate with airborne mobile stations.

35. We continue to believe it important to allow air-ground licensees to have immediate access to channel blocks not allotted in the same geographic area to provide additional radiotelephone service to aircraft on the ground. At airports there usually are numerous aircraft on the ground waiting for clearance to take off. Persons aboard these aircraft can receive additional service from a low power ground station on channels otherwise unused.[31] However, considering GTE's argument on the difficulty of realizing the technical radiation requirements, we are concerned that the antenna pattern specified in the *Report and Order* might not be sufficient for channel reuse due to signal reflections from buildings and the ground. Further, we find In-Flight's proposal infeasible because it is based on a received signal level at the airborne mobile station. The locations of aircraft are highly variable and therefore it is not practicable to design a system that could control the level of signal received at an aircraft in flight. Nevertheless, we do believe that through a combination of techniques, including geographical separation, low power operation, and the use of directional antennas, ground to ground systems can be designed to re-use the non-allotted channel blocks in such a way that they will not interfere with airborne stations. Therefore, we are modifying Section 22.1109(a) by removing the existing antenna pattern requirement and replacing it with an alternative plan based on separation distances from the ground plan allotments. Under the new rules, ground stations providing service to aircraft on the ground must be located at least 300 miles from other ground stations using the same channel blocks to communicate with airborne mobile stations. Additionally, such ground stations must limit the transmitter output power to 1watt ERP. If, nevertheless, the ground stations interfere with airborne mobile stations, the ground station licensee(s) will be required to take appropriate action to resolve that interference. These requirements are sufficient to insure that interference is not caused to airborne mobile stations. Further, allowing for immediate service to aircraft on the ground will in no way prevent licensees from jointly developing a new ground plan.

Equipment Specifications and Design Requirements

36. GTE believes that some of the current technical standards are inadequate and could result in interference among air-ground licensees. To improve these standards, GTE requests that the Commission: 1) specify the adjacent channel emission mask in terms of mean power instead of peak envelope power (PEP), modify the rules to increase adjacent channel emission suppression [32] by an additional 5 dB, and require automatic power control[33] 2) specify power limits in terms of equivalent isotropically radiated power (EIRP) instead of effective radiated power (ERP); 3) adopt amobile carrier-off standard, similar to that applicable to cellular mobile telephones under OET Bulletin 53[34] ; and 4) require that transmitting systems be designed to contain internal safeguards against accidental interference (*e.g.*, automatic shut-down circuits).

37. First, with respect to using mean power versus PEP, the purpose of this requirement is to establish limits on the adjacent channel emissions. We originally specified PEP because it is convenient for measurement of reduced or suppressed carrier amplitude modulated emissions, for which the envelope varies with the modulating signal, as well as for measurement of those with a constant envelope.[35] Mean power, while equally suited to measure-

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[29] Section 22.1109(a) of the Rules requires that the vertical antenna pattern show the following attenuation in all azimuths: 47 decibels above the 1 degree elevation and 67 decibels above 2 degrees elevation.

[30] *See* GTE *ex parte* presentation, October 9, 1990.

[31] Upon take off, any calls in progress could be handed off to channels allotted for airborne communications.

[32] Section 22.1111 of the Rules specifies that the power of any emission on any frequency removed from the center of the authorized bandwidth by more than 3 kHz must be at least 30 dB below the PEP of the main emission and that emissions on any frequency removed from the center of the authorized bandwidth by more than 9 kHz must be at least 60 dB below the PEP of the main emission.

[33] Automatic power control causes the airborne mobile station transmitting power to vary as needed to compensate for the distance between the aircraft and the ground station, and for other factors.

[34] OET Bulletin 53 defines cellular mobile telephone carrier-off status as "a power output at the transmitting antenna connector not exceeding -60 dBm."

[35] GTE's experimental system uses a reduced carrier amplitude

ment of emissions with a constant envelope, is less suitable for measuring signals with varying envelopes. Thus there are advantages and disadvantages to both types of power measurements, depending on the modulation used. However, we will continue to use an emission mask specified in PEP because we do not want to disadvantage licensees who wish to use suppressed carrier emissions and, indeed, some licensees proposed in their applications to use such emissions.

38. With respect to the emission mask, Section 22.1111 of the Rules limits adjacent channel emissions to levels relative to the peak envelope power. GTE requests that an additional 5 dB of adjacent channel suppression be required to reduce the potential for interference. However, at the meeting on March 25, 1991, Clairtel suggested that the Commission adopt a different type of emission limitation on adjacent channels. Instead of an emission mask, which limits adjacent channel power relative to the peak emission power, it proposed that the Commission set maximum power limits[36] on adjacent channel emissions as received at the ground stations. Clairtel argued that this type of specification will allow air-ground system designers more flexibility in establishing different nominal power levels for occupied channels while still preventing interference from adjacent channel emissions. Although there was substantial concurrence with Clairtel's proposal at the meeting, no agreement was reached on the specific power levels.

39. In subsequent *ex parte* presentations, both Clairtel and In-Flight suggested that for the air-ground link the maximum power level should be -130 dBm on the first adjacent channel and -148 dBm on all other channels. They also suggested that for the ground-air link, the transmitter output power should be +2 dBm on the first adjacent channel and -16 dBm on all other channels.[37] GTE argues that the Clairtel and In-Flight proposals are unnecessarily restrictive, citing In-Flight's own estimate that only a 20 dB signal to interference ratio is required for adjacent channel suppression. Additionally, GTE claims that their proposed standard would unnecessarily constrain the amplifier and antenna choices available to air-ground providers and suggests the use of different maximum power levels into a distant receiver to promote design flexibility.[38] GTE recommends the following standards: for the air-ground links greater than or equal to 0.5 mile, the maximum permissible power level on the first adjacent channel should be -130 dBm, for the second adjacent channel this level should be -145 dBm, and for the third and higher adjacent channels, -150 dBm. For the ground-air links, maximum permissible transmitter output power levels on the first adjacent channel should be +10 dBm, and -5dBm for all other channels.

40. The proposals suggested by the commenting parties have merit. Therefore we will adopt a standard based on maximum power limits. We are adopting In-Flight's proposal as we believe it is simpler and provides adequate protection. However, measuring adjacent channel emissions at the -148 dBm level makes equipment authorization and testing extremely difficult. Therefore, in addition to adopting maximum power limits on adjacent channels as proposed by In-Flight, we are also retaining and amending the emission mask for the purpose of equipment authorization. There is no need to increase the first adjacent channel suppression level in the mask, as was proposed by GTE, because it is consistent with the maximum power limits we are adopting. However, to better match the maximum adjacent channel power level for the other adjacent channels we are modifying the emission mask from -60dB to -50dB. Further, for the ground-air link, we will adopt GTE's proposal of +10 dBm on the first adjacent channel and -5 dBm on all other channels. Also, to protect services in the adjacent frequency bands, we are requiring that the ground-air signal levels outside the air-ground frequency bands not exceed -10 dBm.

41. GTE also believes that the Commission should require the use of automatic power control to further reduce adjacent channel interference. It proposes that aircraft be required to reduce output power level amaximum of 30 dB as they approach a ground station. In-Flight, however, argues that 30 dB is inadequate and states that 50 dB of control range is necessary for "robust" operation.[39] At the meeting, the other licensees generally supported the use of automatic power control, but failed to reach consensus on the optimum range of power control necessary. We do not believe it necessary to adopt specific automatic power control rules because to comply with the adjacent channel absolute power levels addressed in paragraph 40, *supra*, licensees will be required to employ automatic power control in their systems. We believe such an approach will allow licensees greater design flexibility.

42. Second, with regard to GTE's request that the Commission specify power limits in EIRP instead of ERP, we note that in Part 22 of the Rules gain is usually specified in reference to a half-wave dipole antenna rather than an isotropic radiator. Consequently, effective power limits are customarily expressed in terms of ERP rather than EIRP.[40] To maintain consistency in Part 22, we will deny GTE's request and leave the power specifications in terms of ERP.

43. Third, GTE is concerned that high levels of residual power may be mistaken for active channels, and therefore requests that the Commission adopt a carrier-off specification that would limit carrier residual power. It suggests that the carrier-off definition reflect the air-ground channel bandwidth and be modified to read as follows: "carrier power output at the transmitting antenna connector not exceeding -60 dBm measured in the 6 kHz channel bandwidth."[41] We do not believe that such a specification is necessary for the air-ground radiotelephone service because the adjacent channel suppression as discussed in paragraph 40, *supra*, willmake it unnecessary.

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modulated emission. Several of the licensees indicate that their systems will employ a multilevel phase shift keying (digital) type of emission.

[36] For calculation purposes, a 0 dBi reference antenna is used.

[37] *See ex parte* presentations, both filed on April 15, 1991, by Clairtel and In-Flight.

[38] *See* GTE *exparte* presentation, April 22, 1991.

[39] *See* In-Flight Comments, page 7.

[40] There is a direct conversion between ERP and EIRP and, therefore, one may be easily converted to the other.

[41] *See* Comments of GTE at Appendix B, p. 16.

44. Finally, with regard to GTE's recommendation that the Commission require that transmitters contain automatic shut-down circuits, we do not see a potential for extensive interference due to transmitter failure and, therefore, the need to adopt such rules. Further, we are concerned that any technical requirement we impose on the air-ground licensees may impede innovation and system design. Nevertheless, we encourage licensees to employ any technique that they view as necessary for the efficient operation of air-ground radiotelephone service. Accordingly, we will not adopt rules requiring that transmitters contain automatic shut-down circuits.

Establishment of Technical Advisory Committee

45. McCaw and GTE submit that there is need for an expedited process to implement technical upgrades and to resolve disputes in a timely manner. GTE proposes the formation of a technical advisory committee chaired by the Commission and composed of all the air-ground licensees. GTE argues that this would allow issues to be resolved in an informal atmosphere and that the committee could submit its recommendations for rule changes to the Commission. It states that if this committee were unable to reach a consensus on some particular issue, then a more formal approach could be used. McCaw suggests that the Commission adopt rules that would shorten the normal two-step-notice-decision rule making procedure to a one-step procedure for changes to the air-ground rules. It suggests that prior coordinated change requests be automatically put on public notice as proposed changes. Further, it suggests that waivers of the air-ground rules be granted upon an appropriate showing that would include any necessary coordination among air-ground providers.

46. We do not believe that it is necessary to institute an informal FCC technical advisory committee for the air-ground service. We believe the rules adopted in this proceeding provide an adequate framework and level of government intervention for the growth and development of the air-ground service. However, we do encourage the licensees to discuss technical improvements before bringing such proposals to the Commission.

47. With regard to McCaw's request to modify our rule making procedures, we note that the Commission's rule making process already allows for both proposals issued on the Commission's own motion and the granting of waivers to our rules. Therefore, no action is necessary in this regard. However, to ensure that all interested parties are provided adequate opportunity to participate in our rule making proceedings, we will continue to consider each proposed rule change on its own merits. Therefore, we will decide only after receiving a proposed rule change request whether to issue a Notice of Proposed Rule Making on our own motion or to release the request for public comment first. Further, licensees and other parties are advised that we will consider waivers of the air-ground service rules on a case by case basis.

48. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by McCaw Cellular Communications, Inc. and GTE Airfone Incorporated ARE GRANTED to the extent indicated herein. IT IS FURTHER ORDERED that under the authority contained in 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r), Part 22 of the Commission's Rules ARE AMENDED as specified in the Appendix below, effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

Re: Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands.

I supported the prior Report and Order that established the air-ground radiotelephone service in the 800 MHz band.[42] I believe our open entry licensing policy will promote competition and facilitate the development of new air-ground service providers. In the long run, I believe the public will benefit from competition among various providers of air-ground communications services.[43]

I also have decided to support this Memorandum Opinion and Order. This Order corrects certain technical specifications, revises the channelization plan to promote competitive entry, provides a reasonable transition period for GTE, and addresses matters that impact upon a licensee's initial ability to compete in this new service. I write separately to highlight my concern about the technical issues involved with the air-ground service. The Commission should continue to be sensitive to the need for further technical adjustments in the air-ground service where our licensees experience interference problems. While I agree with the decision not to form a technical advisory committee for air-ground service at this time, I am concerned that the Commission's formal rulemaking processes could unnecessarily delay further technical adjustments; particularly where technical interference problems are caused by competing air-ground licensees. Our framework for communications channel sharing and ground station frequency reuse requires a significant degree of mutual cooperation among licensees. Resolving any technical problems, particularly those which cause interference, will be more time-consuming if licensees approach such issues in a contentious manner. Our Order encourages licensees to discuss technical improvements with each other before bringing such proposals to the Commission; and I am hopeful that this occurs. However, if this does not occur, I remain open to considering the

[42] Report and Order, GEN Docket No. 88-96, released June 15, 1990, 5 FCC Rcd 3861 (1990).

[43] I note that the Commission has granted licenses to 5 air-ground service applicants. A license will be granted to GTE subsequent to this Memorandum Opinion and Order. I am encouraged by the prospects for competitive air-ground services among these licensees.

formation of an FCC technical advisory committee that could spur cooperation among licensees to resolve technical matters in the air-ground service.

APPENDIX

Part 22 of Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

PART 22 - PUBLIC MOBILE SERVICE:

1. The authority citation in Part 22 continues to read as follows:
AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U. S. C. 154, 303.

2. Section 22.1107 is amended by revising the headnote, the text of paragraphs (a)(1), (a)(2), (a)(2)(ii), and (b), and by removing paragraph (a)(iii), to read as follows:

Section 22.1107 Channel plan.

* * * * *

(a) * * *

(1) Each channel block is subdivided into 6 control channels labeled P-1 through P-6, and 29 communications channels labeled C-1 through C-29.

(2) The authorized channel bandwidths are as follows:

(i) Each control channel has a bandwidth of 3.2 kHz.

(ii) Each communications channel has a bandwidth of 6 kHz.

(b) The center frequencies of the communications and control channels are listed in the following table. Guardbands are labeled "GB".

GROUND TO AIR CHANNELS
(Center frequency in MHz)

CHANNEL NUMBER	CHANNEL BLOCK 10	9	8	7	6
C-1	849.0055	849.2055	849.4055	849.6055	849.8055
C-2	849.0115	849.2115	849.4115	849.6115	849.8115
C-3	849.0175	849.2175	849.4175	849.6175	849.8175
C-4	849.0235	849.2235	849.4235	849.6235	849.8235
C-5	849.0295	849.2295	849.4295	849.6295	849.8295
C-6	849.0355	849.2355	849.4355	849.6355	849.8355
C-7	849.0415	849.2415	849.4415	849.6415	849.8415
C-8	849.0475	849.2475	849.4475	849.6475	849.8475
C-9	849.0535	849.2535	849.4535	849.6535	849.8535
C-10	849.0595	849.2595	849.4595	849.6595	849.8595
C-11	849.0655	849.2655	849.4655	849.6655	849.8655
C-12	849.0715	849.2715	849.4715	849.6715	849.8715
C-13	849.0775	849.2775	849.4775	849.6775	849.8775
C-14	849.0835	849.2835	849.4835	849.6835	849.8835
C-15	849.0895	849.2895	849.4895	849.6895	849.8895
C-16	849.0955	849.2955	849.4955	849.6955	849.8955
C-17	849.1015	849.3015	849.5015	849.7015	849.9015
C-18	849.1075	849.3075	849.5075	849.7075	849.9075
C-19	849.1135	849.3135	849.5135	849.7135	849.9135
C-20	849.1195	849.3195	849.5195	849.7195	849.9195
C-21	849.1255	849.3255	849.5255	849.7255	849.9255
C-22	849.1315	849.3315	849.5315	849.7315	849.9315
C-23	849.1375	849.3375	849.5375	849.7375	849.9375
C-24	849.1435	849.3435	849.5435	849.7435	849.9435
C-25	849.1495	849.3495	849.5495	849.7495	849.9495
C-26	849.1555	849.3555	849.5555	849.7555	849.9555
C-27	849.1615	849.3615	849.5615	849.7615	849.9615
C-28	849.1675	849.3675	849.5675	849.7675	849.9675
C-29	849.1735	849.3735	849.5735	849.7735	849.9735
GB	849.1765- 849.1797	849.3765 849.3797	849.5765- 849.5797	849.7765- 849.7797	849.9765- 849.9797
P-6	849.1813	849.3813	849.5813	849.7813	849.9813
P-5	849.1845	849.3845	849.5845	849.7845	849.9845
P-4	849.1877	849.3877	849.5877	849.7877	849.9877
P-3	849.1909	849.3909	849.5909	849.7909	849.9909
P-2	849.1941	849.3941	849.5941	849.7941	849.9941
P-1	849.1973	849.3973	849.5973	849.7973	849.9973

GROUND TO AIR CHANNELS (continued)

CHANNEL NUMBER	CHANNEL BLOCK 5	4	3	2	1
C-1	850.0055	850.2055	850.4055	850.6055	850.8055
C-2	850.0115	850.2115	850.4115	850.6115	850.8115
C-3	850.0175	850.2175	850.4175	850.6175	850.8175
C-4	850.0235	850.2235	850.4235	850.6235	850.8235
C-5	850.0295	850.2295	850.4295	850.6295	850.8295
C-6	850.0355	850.2355	850.4355	850.6355	850.8355
C-7	850.0415	850.2415	850.4415	850.6415	850.8415
C-8	850.0475	850.2475	850.4475	850.6475	850.8475
C-9	850.0535	850.2535	850.4535	850.6535	850.8535
C-10	850.0595	850.2595	850.4595	850.6595	850.8595
C-11	850.0655	850.2655	850.4655	850.6655	850.8655
C-12	850.0715	850.2715	850.4715	850.6715	850.8715
C-13	850.0775	850.2775	850.4775	850.6775	850.8775
C-14	850.0835	850.2835	850.4835	850.6835	850.8835
C-15	850.0895	850.2895	850.4895	850.6895	850.8895
C-16	859.0955	850.2955	850.4955	850.6955	850.8955
C-17	850.1015	850.3015	850.5015	850.7015	850.9015
C-18	850.1075	850.3075	850.5075	850.7075	850.9075
C-19	850.1135	850.3135	850.5135	850.7135	850.9135
C-20	850.1195	850.3195	850.5195	850.7195	850.9195
C-21	850.1255	850.3255	850.5255	850.7255	850.9255
C-22	850.1315	850.3315	850.5315	850.7315	850.9315
C-23	850.1375	850.3375	850.5375	850.7375	850.9375
C-24	850.1435	850.3435	850.5435	850.7435	850.9435
C-25	850.1495	850.3495	850.5495	850.7495	850.9495
C-26	850.1555	850.3555	850.5555	850.7555	850.9555
C-27	850.1615	850.3615	850.5615	850.7615	850.9615
C-28	850.1675	850.3675	850.5675	850.7675	850.9675
C-29	850.1735	850.3735	850.5735	850.7735	850.9735
GB	850.1765- 850.1797	850.3765- 850.3797	850.5765- 850.5797	850.7765- 850.7797	850.9765- 850.9797
P-6	850.1813	850.3813	850.5813	850.7813	850.9813
P-5	850.1845	850.3845	850.5845	850.7845	850.9845
P-4	850.1877	850.3877	850.5877	850.7877	850.9877
P-3	850.1909	850.3909	850.5909	850.7909	850.9909
P-2	850.1941	850.3941	850.5941	850.7941	850.9941
P-1	850.1973	850.3973	850.5973	850.7973	850.9973

AIR TO GROUND CHANNELS
(Center frequency in MHz)

CHANNEL NUMBER	CHANNEL BLOCK 10	9	8	7	6
C-1	894.0055	894.2055	894.4055	894.6055	894.8055
C-2	894.0115	894.2115	894.4115	894.6115	894.8115
C-3	894.0175	894.2175	894.4175	894.6175	894.8175
C-4	894.0235	894.2235	894.4235	894.6235	894.8235
C-5	894.0295	894.2295	894.4295	894.6295	894.8295
C-6	894.0355	894.2355	894.4355	894.6355	894.8355
C-7	894.0415	894.2415	894.4415	894.6415	894.8415
C-8	894.0475	894.2475	894.4475	894.6475	894.8475
C-9	894.0535	894.2535	894.4535	894.6535	894.8535
C-10	894.0595	894.2595	894.4595	894.6595	894.8595
C-11	894.0655	894.2655	894.4655	894.6655	894.8655
C-12	894.0715	894.2715	894.4715	894.6715	894.8715
C-13	894.0775	894.2775	894.4775	894.6775	894.8775
C-14	894.0835	894.2835	894.4835	894.6835	894.8835
C-15	894.0895	894.2895	894.4895	894.6895	894.8895
C-16	894.0955	894.2955	894.4955	894.6955	894.8955
C-17	894.1015	894.3015	894.5015	894.7015	894.9015
C-18	894.1075	894.3075	894.5075	894.7075	894.9075
C-19	894.1135	894.3135	894.5135	894.7135	894.9135
C-20	894.1195	894.3195	894.5195	894.7195	894.9195
C-21	894.1255	894.3255	894.5255	894.7255	894.9255
C-22	894.1315	894.3315	894.5315	894.7315	894.9315
C-23	894.1375	894.3375	894.5375	894.7375	894.9375
C-24	894.1435	894.3435	894.5435	894.7435	894.9435
C-25	894.1495	894.3495	894.5495	894.7495	894.9495
C-26	894.1555	894.3555	894.5555	894.7555	894.9555
C-27	894.1615	894.3615	894.5615	894.7615	894.9615
C-28	894.1675	894.3675	894.5675	894.7675	894.9675
C-29	894.1735	894.3735	894.5735	894.7735	894.9735
GB	894.1765- 894.1797	894.3765- 894.3797	894.5765- 894.5797	894.7765- 894.7797	894.9765- 894.9797
P-6	894.1813	894.3813	894.5813	894.7813	894.9813
P-5	894.1845	894.3845	894.5845	894.7845	894.9845
P-4	894.1877	894.3877	894.5877	894.7877	894.9877
P-3	894.1909	894.3909	894.5909	894.7909	894.9909
P-2	894.1941	894.3941	894.5941	894.7941	894.9941
P-1	894.1973	894.3973	894.5973	894.7973	894.9973

AIR TO GROUND CHANNELS (continued)

CHANNEL NUMBER	CHANNEL BLOCK 5	4	3	2	1
C-1	895.0055	895.2055	895.4055	895.6055	895.8055
C-2	895.0115	895.2115	895.4115	895.6115	895.8115
C-3	895.0175	895.2175	895.4175	895.6175	895.8175
C-4	895.0235	895.2235	895.4235	895.6235	895.8235
C-5	895.0295	895.2295	895.4295	895.6295	895.8295
C-6	895.0355	895.2355	895.4355	895.6355	895.8355
C-7	895.0415	895.2415	895.4415	895.6415	895.8415
C-8	895.0475	895.2475	895.4475	895.6475	895.8475
C-9	895.0535	895.2535	895.4535	895.6535	895.8535
C-10	895.0595	895.2595	895.4595	895.6595	895.8595
C-11	895.0655	895.2655	895.4655	895.6655	895.8655
C-12	895.0715	895.2715	895.4715	895.6715	895.8715
C-13	895.0775	895.2775	895.4775	895.6775	895.8775
C-14	895.0835	895.2835	895.4835	895.6835	895.8835
C-15	895.0895	895.2895	895.4895	895.6895	895.8895
C-16	895.0955	895.2955	895.4955	895.6955	895.8955
C-17	895.1015	895.3015	895.5015	895.7015	895.9015
C-18	895.1075	895.3075	895.5075	895.7075	895.9075
C-19	895.1135	895.3135	895.5135	895.7135	895.9135
C-20	895.1195	895.3195	895.5195	895.7195	895.9195
C-21	895.1255	895.3255	895.5255	895.7255	895.9255
C-22	895.1315	895.3315	895.5315	895.7315	895.9315
C-23	895.1375	895.3375	895.5375	895.7375	895.9375
C-24	895.1435	895.3435	895.5435	895.7435	895.9435
C-25	895.1495	895.3495	895.5495	895.7495	895.9495
C-26	895.1555	895.3555	895.5555	895.7555	895.9555
C-27	895.1615	895.3615	895.5615	895.7615	895.9615
C-28	895.1675	895.3675	895.5675	895.7675	895.9675
C-29	895.1735	895.3735	895.5735	895.7735	895.9735
GB	895.1765- 895.1797	895.3765- 895.3797	895.5765- 895.5797	895.7765- 895.7797	895.9765- 895.9797
P-6	895.1813	895.3813	895.5813	895.7813	895.9813
P-5	895.1845	895.3845	895.5845	895.7845	895.9845
P-4	895.1877	895.3877	895.5877	895.7877	895.9877
P-3	895.1909	895.3909	895.5909	895.7909	895.9909
P-2	895.1941	895.3941	895.5941	895.7941	895.9941
P-1	895.1973	895.3973	895.5973	895.7973	895.9973

3. Section 22.1109 is amended by revising the introductory text and table, and the text of paragraph (a), and by adding new paragraphs (a)(1) and (a)(2) to read as follows:

Section 22.1109 Geographical channel block layout.

Except as provided in paragraphs (a) and (b) of this Section, ground station locations must be within one mile of the locations listed in this paragraph. The channel block allotted for each location must be used to provide service to airborne mobile stations in flight and may be used to provide service to airborne mobile stations on ground.

Location	N. Latitude	W. Longitude	Channel Block
ALASKA			
Anchorage	61°11'06"	149°54'42"	8
Cordova	60 33 00	145 43 00	5
Ketchikan	55 21 20	131 42 33	5
Juneau	58 21 18	134 34 30	4
Sitka	57 03 30	135 22 01	7
Yakutat	59 30 30	142 30 00	8
ALABAMA			
Birmingham	33 23 24	086 39 59	2
ARIZONA			
Phoenix	33 35 39	112 05 12	4
Winslow	35 01 17	110 43 02	6
ARKANSAS			
Pine Bluff	34 10 56	091 56 18	8
CALIFORNIA			
Blythe	33 36 39	114 42 24	10
Eureka	40 42 59	124 12 09	8
Los Angeles	33 56 45	118 23 03	4
Oakland	37 51 12	122 12 30	1
S. San Francisco	37 41 15	122 26 01	6
Visalia	36 19 36	119 23 22	7
COLORADO			
Colorado Springs	38 44 39	104 51 46	8
Denver	39 46 45	104 50 49	1
Hayden	40 29 04	107 13 08	6

FLORIDA			
Miami	25 48 27	80 16 30	4
Orlando	28 26 53	81 22 00	2
Tallahassee	30 24 02	84 21 18	7
GEORGIA			
Atlanta	33 39 05	84 25 54	5
St. Simons Island	31 09 22	81 23 14	6
HAWAII			
Mauna Kapu	21 24 24	158 06 02	5
IDAHO			
Blackfoot	43 11 34	112 20 57	8
Caldwell	43 38 45	116 38 44	10
ILLINOIS			
Chicago	41 46 49	87 45 20	3
Kewanee	41 12 05	89 57 33	5
Schiller Park	41 57 18	87 52 57	2
INDIANA			
Fort Wayne	40 59 16	85 11 31	7
IOWA			
Des Moines	41 31 58	93 38 54	1
KANSAS			
Garden City	37 59 35	100 54 04	3
Wichita	37 37 24	97 27 15	7
KENTUCKY			
Fairdale	38 04 48	85 47 33	6
LOUISIANA			
Kenner	30 00 44	90 13 30	3
Shreveport	32 27 09	93 49 38	5
MASSACHUSETTS			
Boston	42 23 15	71 01 03	7

MICHIGAN			
Bellville	42 12 17	83 29 09	8
Flint	42 58 21	83 44 22	9
Sault Ste. Marie	46 28 45	84 21 31	6
MINNESOTA			
Bloomington	44 51 30	93 13 19	9
MISSISSIPPI			
Meridian	32 19 10	88 41 33	9
MISSOURI			
Kansas City	39 18 37	94 41 07	6
St. Louis	38 42 45	90 19 19	4
Springfield	37 14 28	93 22 54	9
MONTANA			
Lewistown	47 02 56	109 27 27	5
Miles City	46 25 30	105 52 30	8
Missoula	47 01 05	114 00 41	3
NEBRASKA			
Grand Island	40 58 00	98 19 11	2
Ogallala	41 07 11	101 45 37	4
NEVADA			
Las Vegas	36 05 35	115 10 25	1
Reno	39 35 13	119 55 52	3
Tonopah	38 03 43	117 13 24	9
Winnemucca	41 00 39	117 45 58	4
NEW MEXICO			
Alamogordo	32 54 46	105 56 41	8
Albuquerque	35 03 05	106 37 13	10
Aztec	36 48 42	107 53 48	9
Clayton	36 27 29	103 11 16	5
NEW JERSEY			
Woodbury	39 50 01	75 09 21	3
NEW YORK			
E. Elmhurst	40 46 21	73 52 42	1
Schuyler	43 09 09	75 07 50	2
Staten Island	40 36 05	74 06 35	9

NORTH CAROLINA			
Greensboro	36 05 54	79 56 42	9
Wilmington	34 16 10	77 54 24	3
NORTH DAKOTA			
Dickinson	46 51 05	102 47 35	7
OHIO			
Pataskala	40 04 38	82 41 57	1
OKLAHOMA			
Warner	35 29 31	95 18 25	4
Woodward	36 24 42	99 28 50	9
OREGON			
Albany	44 38 24	123 03 36	5
Klamath Falls	42 06 30	121 38 00	2
Pendleton	45 35 45	118 31 02	7
PENNSYLVANIA			
Coraopolis	40 30 33	80 13 27	4
New Cumberland	40 11 30	76 52 02	8
SOUTH CAROLINA			
Charleston	32 54 10	80 01 20	4
SOUTH DAKOTA			
Aberdeen	45 27 21	98 25 26	6
Rapid City	44 02 36	103 03 36	5
TENNESSEE			
Elizabethton	36 26 04	82 08 06	7
Memphis	35 01 44	89 56 15	10
Nashville	36 08 44	86 41 31	3
TEXAS			
Austin	30 16 37	97 49 34	2
Bedford	32 50 19	97 08 03	1
Houston	29 54 37	95 24 39	9
Lubbock	33 37 06	101 52 14	7
Monahans	31 34 58	102 54 18	6

UTAH			
Abajo Peak	37 50 21	109 27 42	7
Delta	39 23 15	112 30 44	2
Escalante	37 45 19	111 52 27	5
Green River	38 57 54	110 13 40	3
Salt Lake City	40 39 11	112 12 06	1
VIRGINIA			
Arlington	38 52 55	77 06 18	6
WASHINGTON			
Seattle	47 26 08	122 17 35	4
Cheney	47 33 14	117 43 35	1
WEST VIRGINIA			
Charleston	38 19 47	81 39 36	2
WISCONSIN			
Stevens Point	44 33 06	89 25 27	8
WYOMING			
Riverton	43 03 37	108 27 23	9

(a) Air-ground licensees may use any of the channels to provide service from any location to airborne mobile stations on the ground, provided that no interference is caused to service provided by ground stations operating in accordance with the geographical channel block layout or with paragraph (b) of this Section, and provided that the locations of ground stations providing such service are at least 300 miles from all locations using the channel block(s) for communication with 800 MHz airborne mobile stations in flight.

* * * * *

4. Section 22.1111 is amended by **deleting paragraph (b) and** by revising the text of paragraphs (a), (c), and (d) as follows:

Section 22.1111 Emission limitations.

* * * * *

(a) **All transmitters.** The power of any emission **in each of the adjacent channels** must be at least 30 decibels below the peak envelope power of the **main** emission and the power of any emission **in any of the channels other than the one being used and the** adjacent **channels** must be at least 50 decibels below the peak envelope power of the **main** emission. **Additionally, for;**

(1) airborne mobile stations. The power of any emission in each of the adjacent channels must not exceed -130 dBm at any ground station receiver, assuming a 0 dBi receive antenna. The power of any emission in any of the channels other than the one being used and the adjacent channels must not exceed -148 dBm at any ground station receiver, assuming a 0 dBi receive antenna.

(2) ground stations. The effective radiated power (ERP) of any emission outside of the frequency range allocated to this service (see Section 22.1105) must not exceed -10 dBm. The ERP of any emission in each of the adjacent channels must not exceed +10 dBm. The ERP of any emission in any of the channels other than the one being used and the adjacent channels must not exceed -5 dBm.

(b) **(reserved)**

(c) If an emission on any frequency outside of the authorized bandwidth causes harmful interference, the Commission may require greater attenuation of that emission than required in paragraph (a) of this Section.

(d) The provisions of Section 22.106 of this Part do not apply to 800 MHz air-ground systems. **Instead, the provisions of paragraphs (a) and (c) of this Section apply to systems of the 800 MHz Air-Ground Radiotelephone Service.**

* * * * *

5. Section 22.1115 is amended by revising the heading and the text of paragraphs (a) and (d), and by adding a new paragraph (e).

Section 22.1115 Automatic channel selection procedures.

* * * * *

(a) A communications channel is not available for use by a ground station if it is already in use by another ground station

at the same location. Ground station equipment must automatically determine whether channels are in use by other ground stations at the same location, and may employ radio frequency signal monitoring to do so. For example, a communications channel may be determined to be in use if the received signal power on that channel at the ground station exceeds -115 dBm, assuming a 0 dB gain 895 MHz receive antenna, which corresponds to a field strength of approximately 19 dBu V/m. Ground stations may employ an alternative method of determining whether a communications channel is in use provided that such procedure is at least as reliable as radio frequency signal monitoring.

* * * * *

(d) A ground station may not transmit on a communications channel unless it has received the proper identification code. After a ground station has begun to transmit on a communications channel, that channel is not available to ground stations other than the one from which service has been requested until the call is terminated.

(e) A call is terminated by the ground station when either a hang-up signal is transmitted by the airborne mobile station, or the signal from the airborne mobile station on the communications channel is lost for a period of 15 continuous seconds. The hang-up signal is the on-off keying (50% duty cycle) of an unmodulated carrier over a period of one second with pulse duration of 5 milliseconds. However, if all 800 MHz air-ground licensees agree that an alternative hang-up signal and/or procedure would be more efficient or beneficial, such alternative hang-up signal and/or procedure may be used. The licensees must jointly give prior notification to the Commission if an alternative hang-up signal and/or procedure is used.

(6) Section 22.1117 is amended by revising the text to read as follows:

Section 22.1117 Limitations on effective radiated power.

The effective radiated power (ERP) of airborne mobile station transmitters shall not exceed 30 watts. The ERP of ground station transmitters using the allotted channel blocks in section 22.1109 must not exceed 100 watts. The ERP of ground station transmitters operating pursuant to Section 22.1109(a) must not exceed 1 watt.

(7) Section 22.1119 is amended and by removing the last sentence in the text to read as follows:

Section 22.1119 Assignment of control channels.

The Commission will select and assign exclusively one control channel to each air-ground licensee after receiving written notification that the licensee's system will begin providing service within one month.

(8) Section 22.1121 is added to read as follows:

Section 22.1121 Control channel transition period.

In converting its experimental air-ground system to one that conforms to the other rules of this Section, **the experimental licensee** is authorized to use the lower 20 kHz of each channel block, which includes communications channels C-1, C-2, and C-3, for control channels until _____ **(22 months from the effective date of the MO&O)**. After that date communications channels C-1 and C-3 will be available to all air-ground licensees as communications channels and **the experimental licensee** is authorized to use a 3.2 kHz control channel located in communications channel C-2 of each channel block until _____ **(60 months from the effective date of the MO&O)**. After that date communications channel C-2 will be available to all air-ground licensees as a communications channel.

June 25, 1991

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

Re: Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands.

I supported the prior Report and Order that established the air-ground radiotelephone service in the 800 MHz band.[1] I believe our open entry licensing policy will promote competition and facilitate the development of new air-ground service providers. In the long run, I believe the public will benefit from competition among various providers of air-ground communications services.[2]

I also have decided to support this Memorandum Opinion and Order. This Order corrects certain technical specifications, revises the channelization plan to promote competitive entry, provides a reasonable transition period for GTE, and addresses matters that impact upon a licensee's initial ability to compete in this new service. I write separately to highlight my concern about the technical issues involved with the air-ground service. The Commission should continue to be sensitive to the need for further technical adjustments in the air-ground service where our licensees experience interference problems. While I agree with the decision not to form a technical advisory committee for air-ground service at this time, I am concerned that the Commission's formal rulemaking processes could unnecessarily delay further technical adjustments; particularly where technical interference problems are caused by competing air-ground licensees. Our framework for communications channel sharing and ground station frequency reuse requires a significant degree of mutual cooperation among licensees. Resolving any technical problems, particularly those which cause interference, will be more time-consuming if licensees approach such issues in a contentious manner. Our Order encourages licensees to discuss technical improvements with each other before bringing such proposals to the Commission; and I am hopeful that this occurs. However, if this does not occur, I remain open to considering the formation of an FCC technical advisory committee that could spur cooperation among licensees to resolve technical matters in the air-ground service.

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[1] Report and Order, GEN Docket No. 88-96, released June 15, 1990, 5 FCC Rcd 3861 (1990).

[2] I note that the Commission has granted licenses to 5 air-ground service applicants. A license will be granted to GTE subsequent to this Memorandum Opinion and Order. I am encouraged by the prospects for competitive air-ground services among these licensees.

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